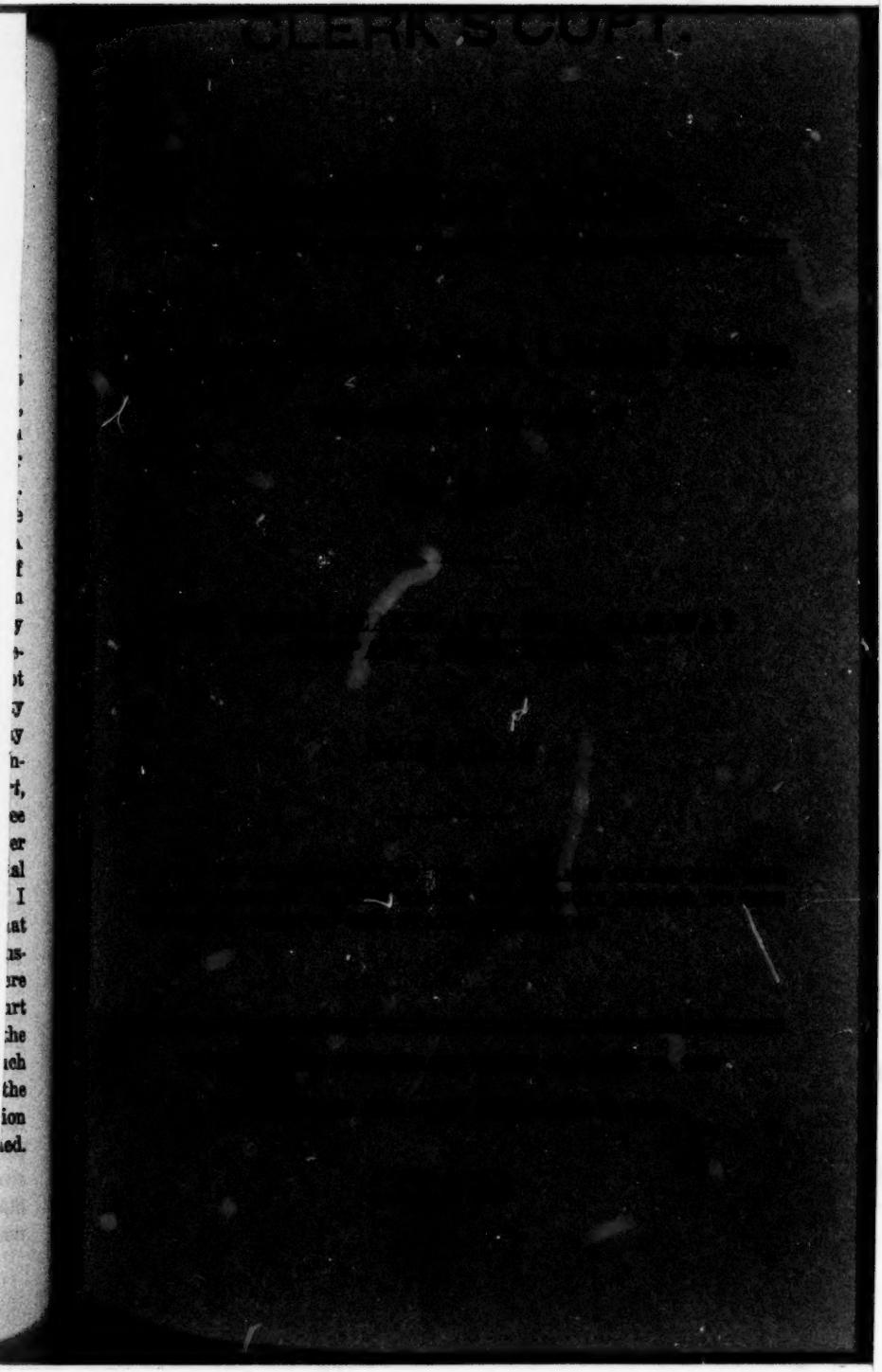
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF THE STATE OF ILLINOIS AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN APPELLATE COURT OF ILLINOIS

ORDER ASSIGNING CAUSE

On the Court's own motion it is ordered that the following numbered cases on the October Term Calendar, A. D. 1927 of said Court be and the same are hereby assigned to the 3rd Div., Appellate Court for hearing and determination, to-wit:

32370 et al.

IN APPELLATE COURT OF ILLINOIS

32370

NICK MIHOS, Appellee,

—

CHESAPEAKE & OHIO RY. CO., Appellant

Appeal from Cook Superior. Error to ——

ARGUMENT AND SUBMISSION—Dec. 28, 1927

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed.

———

[fol. 6] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITIES—April 18, 1928

This day came appellant, by its counsel, and moved the court for leave to cite additional authorities by inserting same in appellant's briefs heretofore filed herein in the above entitled cause as per suggestions filed herein. And the court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

[fol. 7] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

JUDGMENT—June 20, 1928

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error; therefore it is considered by the Court that the judgment aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant, his costs, by him in this behalf expended, to be taxed, and that he have execution therefor.

[fol. 8] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—July 5, 1928

The Court having considered the petition of appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER STAYING MANDATE—July 11, 1928

The Court having considered the motion of appellant that the issuance of the mandate herein be stayed until the time

for the filing of a petition in the Supreme Court of Illinois for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall [fol. 9] have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

IN APPELLATE COURT OF ILLINOIS

ORDER RE PUBLICATION OF WRITTEN DECISIONS OF THIS COURT—July 11, 1928

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 20th day of June A. D. 1928, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions.

32,370, Mihos vs. Chesapeake & Ohio Railway Co. et al.

Clerk's certificate to foregoing papers omitted in printing.

[fol. 10] IN SUPREME COURT OF ILLINOIS

ASSIGNMENT OF ERRORS

Now comes the Chesapeake and Ohio Railway Company, Plaintiff in error, by William G. Wise, its attorney, and says, that in the record, proceedings and judgment of the Appellate Court, within and for the First District of the State of Illinois, there is manifest error to the prejudice of this plaintiff in error, and it assigns as such error the following:

1. The said Appellate Court erred in affirming the judgment of the Superior Court of Cook County.

2. The said Appellate Court erred in not reversing the judgment of the Superior Court of Cook County.

3. The said Appellate Court erred in not reversing the judgment of the Superior Court of Cook County with a finding of fact that the defendant (plaintiff in error herein) was not guilty of negligence.

4. The said Appellate Court erred in entering judgment for costs against plaintiff in error herein.

5. The said Superior Court of Cook County erred in refusing, at the close of the plaintiff's case, to instruct the jury to find the defendant (plaintiff in error herein) not guilty.

[fol. 11] 6. The said Superior Court of Cook County erred in refusing, at the close of all of the evidence, to instruct the jury to find the defendant (plaintiff in error herein) not guilty.

7. The said Superior Court of Cook County erred in admitting improper evidence on behalf of the plaintiff (defendant in error herein), over the objections of the defendant (plaintiff in error herein).

8. The said Superior Court of Cook County erred in refusing to exclude and strike out, on the motion of the defendant (plaintiff in error herein), improper, incompetent, irrelevent and immaterial evidence offered on the part of the plaintiff (defendant in error herein).

9. The said Superior Court of Cook County erred in denying the motions of the defendant (plaintiff in error herein) for a new trial and in arrest of judgment.

By reason whereof the plaintiff in error, Chesapeake and Ohio Railway Company, prays that the judgment of the said Appellate Court may be reversed.

Chesapeake and Ohio Railway Company, plaintiff in Error, by William G. Wise. William G. Wise, Its Attorney.

[fols. 12 & 12-1] IN THE SUPREME COURT OF ILLINOIS, OCTOBER TERM, A. D. 1928

NICK MIHAS, Respondent,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation, Petitioner

Certiorari to the Appellate Court of Illinois, First District. There heard on Appeal from Superior Court, Cook County

Honorable Marcus Kavanagh, Judge, Presiding

PETITION FOR WRIT OF CERTIORARI—Filed Sept. 6, 1928

MAY IT PLEASE THE COURT:

Your petitioner, Chesapeake and Ohio Railway Company, a corporation, by William G. Wise, its attorney, respectfully prays that a writ of certiorari be issued to the Appellate Court for the First District of Illinois requiring it to certify to this court for review and determination the record of the proceedings in the above entitled cause wherein a judgment was rendered in the Superior Court of Cook County in favor of the respondent and against your petitioner, and which said judgment has been affirmed by said Appellate Court.

Your petitioner represents that the facts, points and authorities relied upon by your petitioner for a reversal of the judgment of said Appellate Court and Superior Court of Cook County, Illinois, are hereinafter stated.

Your petitioner further respectfully shows that on the 20th day of June, 1928, the Appellate Court, in and for the First District of Illinois, rendered its opinion in said cause as follows:

[fol. 12-2] Opinion of the Appellate Court in full

Mr. Justice WILSON delivered the opinion of the Court:

This is an action on the case brought by the plaintiff Nick Mihas, for personal injuries sustained on or about March 16, 1926, on the premises of the defendant company, in the City of Peru and State of Indiana. The suit was brought

under the Federal Employers Liability Act, the plaintiff having been an employee of the defendant at the time of the accident and for a number of years prior thereto, and resulted in a verdict in favor of the plaintiff and against the defendant in the sum of $20,000.00, and upon this verdict judgment was entered by the trial court and it is from this judgment that this appeal is prayed and is here for consideration.

As a result of the accident in question, plaintiff suffered the loss of an arm and other injuries and, as there is no question raised by counsel for defendant as to the amount of the verdict, it becomes unnecessary to set out the injuries in detail.

On the day in question it appears that the defendant company was maintaining and operating a certain switch yard, running in an easterly and westerly direction and bounded on the north by Canal street and on the south by the Wabash river. In the vicinity of the point where the accident occurred, the testimony discloses that there were five tracks consisting of a track known as a switching lead which extended east and west on the south side of the yard and that next to and north of this, and running in a parallel direction, was the main track. North of the main track, and running in the same direction, was what was known as the [fol. 12-3] house track, which extended a considerable distance north and south and was connected with the main track at a point considerably west of the point where the accident occurred. North of the house track, and running in the same direction, was house track No. 2, which curved into and connected with house track No. 1. West of house track No. 2, and running parallel to it and connected with house track No. 1, at a point 270 feet west of the place where the accident occurred was house track No. 3, the track upon which the accident in question happened. The three house tracks Nos. 1, 2 and 3 ultimately switched into and connected with the main line at a point over 1,000 feet west of the place of the accident. Track No. 3, which was commonly known as the team track, and which was the track running along the north side of the yard, was used for the purpose of placing cars which were to be loaded or unloaded by teams which, from the record, appeared to have access to said team track, either at the butt end of Cass

street, or at Main street, two streets running in a northerly and southerly direction. Just north of the yard was Canal street running in an easterly and westerly direction. Cass street was a butt end street extending into the yard for a short distance and, from the records, it appears to have been used by teams for the purpose of entering upon the premises of the company in order to load and unload at that point. East of Cass street was Main street, a north and south street which extended into the switch yard of the defendant and was used in a similar manner by trucks and teams. In order to place cars upon the team track in question, it appears that the cars were taken along the main track and then switched back in an easterly direction to and upon the team track. This switching point was a considerable distance west of the point of the accident.

[fol. 12-4] At a point just south of Canal street and west of the butt end of Cass street, there was a small frame house or shack which had been furnished by the defendant for the use of Mihas as living quarters and it appears that he was subject to call at any time during the day or night. His employment was that of section hand and his duties required him to take care of the instrumentalities of the defendant which were used in interstate commerce, and it appears to have been stipulated by the parties that the defendant was, at the time of the accident, engaged in interstate commerce, so that no question was raised as to his right to maintain his action under the Federal Employers Liability Act.

Mihas was 31 years old at the time of the accident and was a Greek who had been in this country for over 15 years. He started to work for the defendant in 1913, and had worked at the particular employment in which he was engaged at the time of the accident, since 1921. He was required to take care of switch lamps and lights along the right-of-way of the defendant for a distance of about four miles. He was receiving, at the time of the accident, $3.60 a day and started to work about six o'clock in the morning, but was required to live upon the premises so that he would be subject to call at night, if necessary. In order that he might carry out his duties he was provided with a small speeder car, which had three wheels and was operated by hand and could be lifted up and placed upon the track.

This car was kept in a small building called the "Lineman's Shop," directly south of the habitation of the plaintiff and between the track known as the lead track at the extreme southern side of the yard and the Wabash river, so that if the plaintiff proceeded from his house directly to the shop in order to reach his speeder car, it would have been necessary for him to cross the five tracks hereinbefore referred to.

[fol. 12-5] On the morning of the day of the accident plaintiff, according to his testimony, left the small frame house, furnished by the company, where he lived, at about ten minutes to seven and started for his speeder car. This house, where he lived, was situated 25 feet north of the team track and, as he reached this track, he looked both ways and saw cars extending east and west 400 or 500 feet. They were standing still at the time and he observed two men unloading coal from one of them on to a truck. This truck appears to have been located just north of the team track and at the end of Cass street and very close to the point where the accident occurred. According to plaintiff's testimony, he looked both ways and saw no engine nor cars approaching these standing cars from the west. At a point some distance to the west, the track curved away from him, so that he would not have been able to see the approach of cars with the same advantage as he would have had if he had been standing on the inside of the curve, which would have been on the other side of this particular track. He testified further, that it was customary for the defendant when switching cars in, upon and long this particular team track to send someone ahead in order to notify teamsters that cars were to be placed upon said switch, or so that they could guard themselves against danger by reason of said cars coming in contact with those that were standing upon the team track and were being unloaded. He testified that, seeing no cars approaching and observing the teamsters unloading a car on the other track, he proceeded to cross over a coal car which was standing at a point directly in line between his house and the speeder in order to reach the point where his speeder car was kept and, as he was in the act of climbing up over said car, the cars standing on this track were struck by some other cars switched in and [fol. 12-6] upon the team track and he was thrown from the car and received the injuries in question.

It appears from the testimony that the collision was caused by a flying switch, the cars having been taken down the main track and then propelled with sufficient speed to carry them, by their own momentum, on to the team track, and that they struck the standing cars with considerable violence, so, as a result, the cars standing on the team track were moved some distance and, as testified to by Sam Cretas, one of the witnesses on behalf of the plaintiff, there was a crash and the coal was flying all over. William Sharp, a witness called on behalf of the plaintiff, testified that he was a sand and gravel contractor and was unloading some coal, at the time in question, onto a truck and that his son was helping him. They had been working on the morning in question unloading the coal since about six o'clock in the morning and had made a trip and had returned to the point in question, and that there were a lot of cars standing east and west from the coal car which was unloading; that he had just started away from the team track, when he heard the crash and had reached a point about 30 or 40 feet from the place where he had been unloading; that it was a couple of seconds after the truck started away that he heard the crash; that it was the uniform custom to notify persons unloading at this point whenever the defendant was about to run cars in and upon said track.

It does not appear from the evidence that there was any notification whatever, on the morning of the accident by the defendant, that it intended to place additional cars upon said team track.

It is urged as a ground for reversal that from the testimony, the plaintiff, in attempting to cross over the cars in question, was guilty of contributory negligence and that the defendant was not guilty of negligence in making the [fol. 12-7] flying switch in question. In support of this contention it is urged that the plaintiff could have proceeded down Canal street and crossed the tracks at a point several hundred feet to the east and come around the cars to the point of his destination. This would have necessitated his leaving the premises of the company and returning to the same premises, and would still require him to pass over a number of tracks in order to reach the shanty where his speeder was kept. We cannot see any force in the argument, particularly in view of the fact that his house was

located on the premises of the defendant, and his daily occupation required him to proceed to the shanty where his speeder was located, which was also upon the premises of the defendant. It seems illogical to say that, where the defendant company had provided a habitation for its employee on the premises, he should be required to leave those premises in order to again return to them for the purpose of obtaining his car, and unless he did so, he was not exercising reasonable care for his own safety.

As to the question as to whether or not the defendant company was negligent in the manner in which they handled the cars in question on the team track, it is sufficient to stay that, from the testimony, it appears that the cars must have proceeded over the track on the team track at a considerable speed so that they struck the standing cars with a great deal more force than was requisite under the circumstances. So far as the public is concerned, and by that we mean people dealing with the defendant in unloading cars at the point in question, we are fully of the opinion that the flying switch, without any warning to those so engaged, was a negligent operation. It is urged by counsel for defendant that this may be true, in so far as the public is concerned, but that it owed no duty to the plaintiff and that, [fol. 12-8] even though there may have been a custom to warn teamsters, there was no obligation to warn plaintiff, as he was an employee of the defendant and not entitled to the same warning to which the public was entitled. It is urged that the trial court, in permitting evidence as to this custom was in error. We cannot agree with this contention. An employee in the exercise of ordinary care has a right to rely upon those things which he has learned during the course of his employment and to act upon his general knowledge so obtained. If the plaintiff had been in the custom of proceeding directly from his home to the place where his speeder car was located and he testified that he had never been directed to do otherwise, and was required to cross over all the tracks in the switch yard, in doing so, it would appear to us that he had a right to rely upon the fact that, in crossing the track in question and finding that there were teamsters engaged in unloading a car and knowing that the company was in the habit of sending some one ahead of approaching cars which were to be placed upon said track

in order to warn the teamsters, he was not guilty of contributory negligence in assuming that the company would do so on the morning of the accident in question. It would hardly be fair to say that, where a company had created by custom a certain usage, that it should be allowed to go free from responsibility where it, in fact, by its servant, had violated the custom which the employee had grown to rely upon. This court in the case of Otstot v. Indiana, Illinois & Iowa R. R. Co., 103 Ill. App. 136, where it was urged that safeguards and precautions were for the exclusive use and protection of the public, said:

"Whether such rules prevail in the various states as claimed, has no influence upon us in determining the issues in this case. The rule is well settled in Illinois, that a servant of a railroad company, though performing menial [fol. 12-9] labor, like that of a section hand, whether in railroad yards or on private right-of-way, is entitled to all the rights offered the public, either by ordinance, statute, or general custom of the company. I. C. R. R. Co. v. Gilbert, 157 Ill. 354; St. L. A. & T. R. R. Co. v. Eggmann, 161 Ill. 155; E. St. L. C. R. R. Co. v. Eggman, 170 Ill. 538."

The Supreme Court of this state in the case of Pridmore v. C. R. I. & P. R. R. Co., 275 Ill. 386, in its opinion says:

"It is also contended that the decease, by reason of his being employed as a flagman, did not come within the class of persons protected by the provisions of the statutes and ordinances relating to the speed of trains, headlights upon locomotives and other warning signals. Employees of railroad companies working in private railroad yards or grounds within city limits or on railroad tracks are entitled to the protection of ordinances or statutes regulating the speed of trains within city limits and providing for the ringing of the bell or blowing of the whistle or the carrying of headlights on moving engines. East St. Louis Connecting Railway Co. v. Eggman, 170 Ill. 538; Illinois Central Railroad Co. v. Gilbert, 157 id. 354."

It is true that in this case just cited the plaintiff was employed by another railroad company, but the language of the decision is broad enough to take in employees of the carrier, responsible for the accident. In the case of Ehrlich v.

Chicago Great Western Railroad Co., 160 Ill. App. 379, the court in discussing at some length the rights of employees to rely upon rules, regulations and ordinances, said:

"It is also true that employees and persons lawfully around tracks and trains have a right to rely upon the rules of the railroad company, as held in C. & A. R. R. Co. v. Kelly, 182 Ill. 267, and C. & A. R. R. Co. v. Eaton, 194 Ill. 441. In Otstot v. I. I. & I. Ry. Co., 103 Ill. App. 136, I. I. & I. Ry. v. Otstot, 113 Ill. App. 37, and C. &. N. W. Ry. Co. v. [fol. 12-10] Thomson, 128 Ill. App. 594, wer said that workmen upon a railroad right of way had a right to expect the master and its other servants operating trains to observe ordinances and statutes, and also rules and general customs of the company."

Plaintiff at the time of the accident was engaged in interstate commerce. Padersen v. Delaware Lackawanna & Western Ry., 229 U. S. 146.

We have examined the cases cited by counsel in support of their contention, but are of the opinion that the general rule in this state, seems to be that an employee is entitled to consider the rules and customs of his employer in governing his conduct while upon his employer's premises and has a right to rely upon the observance of such rule or custom by his employer as well as the general public would have such a right, and that the jury had a right to consider the fact that there was such a custom in force in the yards of the defendant company, where the accident occurred, in arriving at the questions as to whether or not the plaintiff, at the time of the accident was, himself, in the exercise of due care for his own safety.

For the reasons expressed in this opinion, the judgment of the trial court is affirmed.

Judgment affirmed.

Taylor, P. J., and Holdom, J. concur.

[fol. 12-11] Statement of the Case

The contention of the petitioner, on the trial of this cause in the Superior Court and in the errors assigned for reversal in the Appellate Court, has been confined to two points:

First. That there is no evidence of any negligence on the part of the petitioner which resulted in injury to the respondent.

Second. That the trial court erred in allowing improper evidence to be submitted to the jury.

We think that the Appellate Court has not sufficiently stated the evidence as to the facts relating to the accident; therefore it becomes necessary to make a brief statement thereof.

This suit was brought by respondent (hereinafter called plaintiff), under the Federal Employers' Liability Act, and a declaration containing three counts was filed. The negligence charged in the declaration was the failure of the petitioner (hereinafter called defendant) to give warning to the plaintiff before switching cars on the yard tracks; also failure to warn persons said to have been engaged in unloading from a coal car on the team track. Pleas of not guilty to each count of the declaration were filed by the defendant, and defendant also pleaded that the plaintiff was not in the exercise of care for his own safety, but was guilty of contributory negligence, which was the sole and proximate cause of the injury.

At the close of the plaintiff's case, and again at the close of all of the evidence, the defendant made its motion in writing, requesting a directed verdict, which motion was [fol. 12-12] overruled. A verdict of $20,000 was awarded by the jury, on which judgment was entered, defendant's motion for new trial having been overruled.

It appears from the testimony that Mihas had been in the employ of defendant about fourteen years; that at the time of the accident his employment consisted of taking care of switch lamps and lights along defendant's right of way, near Peru, Indiana, and that he had been doing that particular work for about four years. Mihas lived in a small house alongside the switch tracks, in the yards at Peru, and had been living there about four years. This house was furnished him, and another man, rent free, by the defendant. During the time that he lived in the company's house it appears that Mihas was familiar with the switching operations conducted in the yards and knew that cars were switched in and out of the side tracks every day,

and that such switching was usually done between six and seven o'clock in the morning, so that the cars which were brought in, would be ready on team and house tracks for unloading at seven o'clock in the morning. The location of the tracks, freight houses, etc., are sufficiently set forth in the opinion of the Appellate Court.

Mihas used a small speeder car, operated by hand, in going up and down the line to look after the switch lights. This speeder car was usually located on the south side of the yard and it was necessary for him to cross the tracks in order to get to the speeder car. The accident occurred on March 16, 1927, about ten minutes to seven in the morning. There were no witnesses to the accident. According to his testimony, Mihas arose about 5:30 on the morning of the accident, made his breakfast and went out in the yard surrounding his house and fed some chickens. After feeding the chickens, he went back to his house and stayed there until about ten minutes to seven. When he came out of [fol. 12-13] his house by the back, or kitchen door, he says he saw two men, who had been unloading coal into a truck, leaving the coal car. The truck was moving away from the car as he came out of his kitchen door, and he did not say anything to the men in the truck, nor did they say anything to him. The men in the truck testified that they did not see Mihas at any time on that morning and did not know that he had been hurt until they came back about an hour later to get another load of coal. Mihas' testimony is, that when he came out of the kitchen door he looked to one side and the other, did not see or hear any train or cars, and that nobody was around. He went directly from his house and attempted to cross between two of the standing cars, and just at that moment a string of nine cars which had been switched on the team track struck the standing cars, causing Mihas to fall between the cars, with the result that his arm was so crushed that it was necessary that it be amputated.

It appears from the evidence that the men who had been unloading coal from the coal car were not in the car at the time Mihas came out of his house, but had put on their load and the truck was some distance away from the coal car. The testimony on this point was as follows:

On his direct examination (Abst. 29) Mihas said: "The truck just pulled away from the coal car, maybe half a minute." On his cross-examination (Abst. 31) Mihas said:

"When I came out of the house I started right from my door. I looked to one side and the other side and I never saw nobody, any train, around. I only saw two men unloading coal. They were just leaving, just moving the truck. They had just left the car with the truck when I came out of the house. The truck was moving away from the car. Before I went to get through the car, the truck had left."

[fol. 12-14] William Sharp, a witness for the plaintiff, testified (Abst. 15):

"After we loaded up the second time we just got the truck started and got away, about 30 or 40 feet, and I heard a big crash. The big crash was the cars switched together in there where the coal car was unloading. We just got loaded up and started our truck up and got away about 30 or 40 feet when this happened. I suppose it was about five minutes after we got out of the car.

Mr. Ryan: Did it take you five minutes to go 30 or 40 feet?

The Witness: Well, the time we got started, sometimes the truck don't start very quick, you know."

On cross-examination Sharp testified (Abst. 18) that he did not see Mihas that morning and knew nothing of the accident until he came back for another load of coal.

Edward Sharp, a witness for the plaintiff, testified on direct examination (Abst. 22): "We did not have a self-starter on the truck, had to crank it. Did not take very long to move the truck 30 or 40 feet after we got it cranked, a minute or two."

It thus appears that when Mihas came out of his house the truck used in unloading coal from the car in question, was moving away from the car. The Sharps who were unloading the coal had been out of the car for five minutes. It took that much time to get the truck started. When Mihas came out of his house the men were not in the coal car, but had put on their load, cranked the truck, and were 30 or 40 feet away from the car.

There was no other evidence as to what occurred at the time of the accident, except the testimony of witnesses of Mihas to the effect that the cars came together with a loud crash sufficient to scatter some of the coal out of the coal car. The witnesses for defendant, trainmen engaged in the switching operation, said that there was nothing unusual about the operation at that time, that the cars were going [fol. 12-15] at about four or five miles an hour, which was the usual and customary speed in handling cars in such an operation, and that there was no damage done to any of the cars (Abst. 55).

The undisputed testimony shows, that it was not the practice or custom to unload cars on the team or house tracks until the switching was completed and the cars placed or "spotted" for unloading.

Henry Bertram, a witness for the defendant, testified as follows:

"The usual and customary place for unloading cars was east of Cass street, which was approximately one hundred feet east of Nick's house. The practice permitted by the company was to set the cars east of Cass street for unloading. Such cars were generally set at that place before seven o'clock in the morning. People whose business it was to unload cars were not allowed to unload west of Nick's house on the team track. They were not supposed to, or allowed to unload before they had been placed for unloading by the switching operations that were conducted before seven o'clock in the morning. The switching operations conducted there in the morning included the house tracks also. The switching operation was for the purpose of placing all of the cars in position on the three tracks for unloading, and that switching was to be done before seven o'clock in the morning" (Abst.39).

William Lynch, a witness for the defendant, testified (Abst. 46) that the usual place for unloading cars on Team Track No. 3 was east of Cass street, and that men unloading cars on the main track began their work at seven o'clock a. m.; that the men were not to start unloading cars until they were "spotted" or properly set. Any cars west of Cass street were not properly set for unloading (Abst. 47).

See, also, Lynch's testimony on cross-examination (Abst. 48, 49).

[fol. 12-16] It appears from the evidence that the switchmen engaged in the switching operation did not see anyone in or around cars standing on the team track.

J. B. Pope, witness for the defendant, who was in charge of the switching crew, said that he examined the team track and house track to see if there was room enough to drop the cars in there from the main line. He said:

"I did not see anybody near the cars that were standing on the team track. When I was up there at the crossover, I looked and I did not see a soul. I saw nobody around there. I didn't see anybody in the coal car. If there had been a truck to the other side of the coal car, I could not have seen it. The coal car was not in the position where cars are usually placed for unloading. They were usually placed east of Cass street. It was part of my duty to spot the cars at the various places for unloading, and it was customary to place those cars east of Cass street. That was always done about seven o'clock in the morning, or a little earlier than that" (Abst. 50).

Louis L. Kolb, a witness for the defendant, one of the switching crew, said that he did not see anybody around the cars on the team track (Abst. 54).

It further appears from the testimony of Mihas that he made no inquiry of the Sharps as to whether or not they had been warned by the trainmen. Mihas said:

"When I came out of the house, I started right from my door and I looked to one side and the other side and I never saw nobody, any train, around. I only saw two men unloading coal. They were just leaving, just moving the truck. They had just left the car with the truck when I came out of the house. The truck was moving away from the car. Before I went to get through the car, the truck had left. Just at that time I went to get in between the cars. The men were in the truck and it was going away directly east. I did not say anything to the men in the truck or they did [fol. 12-17] not say anything to me. I don't know who the

men were in the truck. I saw them, I didn't talk to them. They didn't say anything to me" (Abst. 31).

It further appears that Mihas was familiar with the switching operations on the team track and knew that cars were shoved in on that track every morning between six and seven o'clock. He says:

"During those four years I lived there I was familiar with the switching operations in the yard. I know that they switched cars in there out of the different tracks, the team tracks and the house tracks, continuously during that time, every day, but not at all times of the day. There was usually a train switching there in the morning, between six or seven o'clock every morning. They brought cars in from what they call the lower yards, west of my house, put them in on the team track and the house track. They had those switching operations every day during the morning, between six and seven o'clock, and I saw them doing it practically every morning. I knew that they were switching cars back and forth. I knew that it was customary to switch cars on the different tracks every morning" (Abst. 31).

It also appears from Mihas' testimony that he did not have any regular time for going to work in the morning. He said:

"I didn't have any regular time for going to work. I went to work at all times between half-past five and seven o'clock in the morning. Some mornings at six o'clock, some mornings at six-thirty. I would be likely to come out of my house to go to work at any time between six and seven in the morning. Nobody would know what time I would come out of the house and go on my way to work. I didn't have any particular time when I left my house to go to work. It was between six and seven o'clock" (Abst. 33).

It also appears from the evidence that there was no street or road crossing the tracks in the yards at the place where [fol. 12-18] the accident happened. There was a street called Broadway which was about two blocks east of the plaintiff's house, which crossed all of the tracks in the yards It also appears that team track No. 3 extended west from

the plaintiff's house and had a clearance of about 140 feet, which was sufficient to hold three cars (Abst. 46).

Point I

There is no evidence that the injury to the plaintiff was caused by any negligence on the part of the defendant, and therefore the Appellate Court erred in not reversing the judgment of the Superior Court with a finding of fact that the defendant was not guilty.

A careful reading of the opinion of the Appellate Court leads to the conclusion that the court based its decision on the fact that the trainmen failed to warn the men who were unloading coal from the coal car at the time the accident happened. We respectfully submit that the evidence does not sustain or justify the court's decision. There is no dispute as to the facts, as shown by the evidence, as to the manner and circumstances under which this accident occurred. The undisputed evidence shows:

First. That the plaintiff, Mihas, was thoroughly familiar with the manner in which the switching was conducted and the placing of cars on the various tracks in the yards adjacent to his house. He had seen these switching operations conducted daily during all the time that he lived there, and he knew that the switching was done every morning at about the same time, shortly before seven o'clock.

[fol. 12-19] Second. Mihas, when he came out of his house on the morning in question, did nothing whatever to ascertain whether a switching operation was in progress except to look along the tracks toward the west. He went immediately from his house to the cars, a distance of about twenty-five feet, and attempted to cross between them.

Third. The men who were unloading coal (the Sharps) were not in the coal car at the time Mihas came out of his house. They were in the truck and the truck was thirty or forty feet from the coal car when the impact came.

Fourth. The switchmen had no reason to anticipate or believe that the Sharps, or any other persons, were unloading from the cars at that time and place, because the undisputed testimony shows that it was the custom and

practice that no unloading be done until after the cars had been set by the switching operation which was conducted before seven o'clock every morning. The Sharps disregarded this custom and practice.

Fifth. Mihas did not make any inquiry of the Sharps as to whether or not they had been told or warned of the switching operation.

Sixth. It appears from the evidence that Mihas could have walked three car lengths west, passed around the standing cars, and be in a position to see any cars being switched on to the team track.

These being the undisputed facts, how was it possible to avoid the accident and what could the employes of the defendant have done to prevent it. Certainly it can not be said that if the Sharps had been warned the accident would not have occurred, because Mihas, if he was relying on such warning, did not make an inquiry of the Sharps.

In order to recover, it was incumbent on the plaintiff to prove, by a preponderance of the evidence, some act of [fol. 12-20] negligence on the part of the defendant. The Appellate Court in its opinion holds that the negligence of which the appellant was guilty, was the failure of its employes to notify the Sharps that they were about to switch the cars on the team track. We submit that the evidence does not support this conclusion but on the contrary shows that the Sharps were not in the coal car, and if they were, they would not have been entitled to any warning, because they were engaged in unloading coal from the car at a time and place contrary to the well known custom and practice of the company to the effect that unloading on the team tracks should not commence until the cars had been spotted and until after the switching operations were completed, about seven o'clock in the morning. The Sharps began unloading at the coal car about five-thirty on that morning, and had already taken out one load, delivered it and had come back to the coal car for a second load, before the switching had been done. Under the circumstances, therefore, the defendant owned no duty of warnnig to the Sharps, and Mihas had no right to rely upon a supposition that they had been warned. The trainmen had no knowledge of the presence of the Sharps or of Mihas at the place where

the accident happened, and had no reason to anticipate their presence at that place and at the time in the morning. The switching ws done in the usual and customary manner, with which Mihas had been familiar for a long period of time. In attempting to cross between the cars, under the circumstances, we submit that he assumed the risk of injury, and that under the law the defendant was not guilty of negligence.

In considering this question it should be borne in mind that the case is one under the Federal Employer's Liability Act and that "rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential [fol. 12-21] to recovery." New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371. See also Missouri P. R. Co. v. Aeby, U. S. Supreme Court Advance Opinions, 1927-1928, No. 5, dated January 16, 1928, page 159.

In Davis v. Philadelphia & R. Ry. Co., 276 Fed. 187, the plaintiff, Davis, was a track walker and, in the course of his employment, was returning from a tool house with necessary tools to make certain repairs. There were three tracks at the point of the accident, and while he was proceeding eastwardly a freight train came from the west, overtook and struck him. The court said, page 189:

"Thus, in the absence of evidence showing that those in charge of the engine were aware of Davis' presence on the track where he was injured, or, having discovered him, recklessly ran him down, they should not be held guilty of negligence. To hold the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would remove the entire responsibility of caring for the safety of those employed upon the track, and place it upon the shoulders of those having to do with the operation of the engine and train, involving attention to signals of every degree of importance, and entirely relieve those who have nothing but their own safety at stake."

In William Aerkfetz v. Humphreys, et al., Receivers, 145 U. S. 418, the plaintiff was in the employ of the defendant in the railroad company's yards, working on one of the tracks therein, and while so engaged was run over

and injured by a freight car moved by a switch engine. At the time of the accident plaintiff was working near the west end of the yard when a switch engine, pushing two cars, moving slowly along the track on which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work without looking backward [fol. 12-22] or watching for the moving engine until he was struck and run over by the first car. The court said, on page 421:

"As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineer or of any other employe, that he thus at work in a place of danger would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? * * * The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movements of the cars, would take reasonable precaution against their approach. * * * It cannot be that, under the circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of defendants, and if by any means negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury."

See Toledo, St. L. & W. R. Co. v. Allen, United States Supreme Court Advance Opinions No. 7, dated March 1, 1928, page 267, on page 268, where the court says:

"The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers

by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. (Citing cases.) This case is governed by that Act and the principles of the common law as [fol. 12-23] applied in the courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant. (Citing cases.) And, except as specified in Section 4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees." (Citing cases.)

And on page 269 the court says:

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. Aerkfetz v. Humphreys, supra."

The case of Hines, Director General of Railroads v. Jasko, 266 Fed. Rep. 336, is very similar to the case at bar. In that case Jasko was an inspector in the freight classification yards of the railroad and was familiar with the work and dangers incident thereto, having been engaged in it for some years. He attempted to pass between an opening of about three feet between two cars and was killed. Jasko was rightfully at the place where the accident happened and was actually engaged in working on the cars. The court says, on page 340 of the opinion:

"When it is considered that such openings are a necessary incident to the operation of such a yard, it cannot be said that their existence implies an invitation to use them as a passageway, and that the railroad has, by reason

of such accidental spaces, undertaken to safeguard an em- [fol. 12-24] ploye who voluntarily and without necessity chooses to use them. And, apart from this, no one has suggested how, in any practical way, the complicated work of a shifting yard could be workably carried on and trains made up, if the duty was placed on the railroad of placing trainmen on all positions where yard employes, approaching from either side, such numerous accidental openings, could be warned and stopped. Yet this is the warning duty the trial judge erroneously, as we think, placed on the railroad in his charge, etc."

Mihas was thoroughly familiar with the practice of the switching operations conducted every morning for the four years that he lived alongside the tracks. According to his own statement, the manner in which he came out of his house and immediately attempted to cross between the cars, put it out of the power of anyone to warn him of the switching operation in progress. It can be well said here, as in the Aerkfetz case, supra, that it could not be, under those circumstances, that the defendant would be compelled to send a man to the plaintiff's house to find out first, if he was there, and if so, to warn him that cars were being switched into the team track.

In Krysiak v. Pennsylvania R. Co., 270 Fed. 758, Krysiak, an employe, was run down and killed by a train of the defendant on its main line within the yard limits. The action was brought under the Federal Employers' Liability Act by his administratrix, and the defendant was charged with neglect in failing to provide its servant with a reasonably safe place in which to work, and in operating its train at a great speed without warning him of its approach.

On page 760 the court said:

"We are at a loss to find any duty of warning, which, under the circumstances of train movements through its railroad yard, the defendant owed Krysiak. The place [fol. 12-25] was one with dangers on every hand. To afford protection against such dangers in such places by warnings, other than those which arise from emergency, has, from the very nature of the place and work, been found impracticable in most instances. In default of some

practical way of protecting yard employes from the great dangers normally incident to train movements, courts have been constrained to hold that yard employes assume the risk of these manifold dangers, unless arising from negligence. Certain it is that in a particular case a railroad company cannot be held liable for its failure to do something which the plaintiff has not shown it could and should have done."

Mihas had no occasion to take any chance whatever in attempting to pass between these cars. Knowing of the switching operations as he did, it was his duty to exercise the greatest care for his safety. He had ample time to get to his work or to get to the speeder car across the tracks to the south. Under the undisputed testimony, he could have walked west from his house three car lengths, passed around the west end of the standing cars, and as the switching operation was coming from that direction, he would have been in a position to see the cars coming in on the track. In this connection see Hinson v. Atlanta, etc., Air Line R. Co., 172 N. C. 646, where the court says:

"The habit of employes going under trains instead of around them is not sufficient to charge an engineer with notice that plaintiff was under the drawhead. There is no pretense that plaintiff's condition was discovered, and as he was under the train it is manifest he could not have been discovered by anyone on the engine or tender. Railroad employes familiar with conditions in yards, who attempted to go under the coupling between two cars standing on the track when he could have gone around the end of the string assumed the risk, and cannot recover for injuries received when an engine struck the cars while he [fol. 12-26] was under them with such force as to push the wheels of one of them over his leg."

Under the facts and circumstances surrounding this accident, defendant owed no duty of warning to the plaintiff, or the men unloading coal, of the switching operation. See the following cases:

Missouri Pacific Railroad Company v. Mary I. Aeby. United States Supreme Court Advance Opinions, 1927-1928, No. 5, dated January 16, 1928, page 159.

operation as far as the plaintiff was concerned. Toledo, St. L. & W. R. Co. v. Allen, U. S. Supreme Court Advance Opinions, 1927-1928, No. 7, dated March 1, 1928, page 267. See Lord v. Boston, etc., R. Co. (N. H.), 65 Atl. 111.

See also Elliott v. C. M. & St. P. Ry., 150 U. S. 245.

[fol. 12-29] Point III

The trial court erred in admitting evidence as to a custom and practice of warning persons working in and about freight cars standing on a side track, unloading the same, and the Appellate Court erred in sustaining the rulings of the trial court on the admission of such evidence.

We submit that the record shows that the plaintiff did not and could not have relied upon any warning that should have been given to the men unloading coal (the Sharps), first, because the Sharps were not rightfully on the premises of the defendant at the time and place when the accident occurred; second, that the trainmen did not see the Sharps, or anyone else, in or about the cars on the team track; third, that the plaintiff did not make any inquiry of the Sharps as to whether or not they had been warned; and, fourth, the Sharps were not in the car at the time the plaintiff came out of his house, but had left the car and were on their way out of the yards.

The evidence shows that the Sharps began work unloadin the coal car at five-thirty on the morning of the accident. The coal car had not been properly set for unloading at that time. When the switching crew came in to set the cars on the team and house tracks, according to their usual custom and practice, they did not see these men in or about the coal car. It was the custom to warn persons who are rightfully working in and about the cars after the cars had ben set in the proper places for unloading on the team track and on the house tracks, thus it appears that the Sharps were not entitled to warning unless the switching [fol. 12-30] crew actually saw them in or about the cars.

For these reasons the testimony of the Sharps as to the custom and practice of warning persons unloading cars should not have been admitted in evidence. Their evidence was admitted over the objection of the defendant (Abst. 16,

17), and the trial court overruled the motion of the defendant to strike out the testimony at the conclusion of the plaintiff's case (Abst. 35, 36).

We submit that this testimony was not admissible for the further reason that the plaintiff had no duties to perform, or work to do in and about the cars where he was injured, and consequently he did not belong to the class of persons entitled to notice of the switching operations.

The general rule is stated in 39 C. J., page 879, as follows:

"The general rule as to precautions against known or apparent dangers apply in cases of injuries to servants crossing tracks or yards. Where a servant when crossing a track or yard is not engaged in the performance of any work which demands his attention, it is his duty to see and hear approaching trains, and to give his undivided attention to what is taking place about him, and if he is injured by reason of a nonobservance of this requirement, he cannot recover. In these circumstances, the servant is held to the same measure of care in looking and listening for approaching trains as any other person lawfully passing over the track. He has no right to rely on a custom to give warnings and signals, given only to those servants actively engaged in the performance of services."

In Cincinnati, etc., R. Co. v. Swann, 160 Ky. 458 (169 S. W. 886), it is held that:

"A railroad foreman engaged in work alongside the track, part of whose duty it was to watch for approaching [fol. 12-31] trains, is not entitled to rely on the observance by train employees of rules requiring them to slow down and sound warnings on approaching such places since these rules were not intended for the class of employees to which he belonged."

See, also, Williams v. C. & A. R. R. Co., 135 Ill. 491.

This was a case brought to recover damages against a railroad company for failure to ring a bell or blow a whistle for a crossing, as required by statute. The plaintiff was working in a field near a railroad, with a team of horses, and claimed by his declaration the right to warning to enable him to protect his horses so that they would not run away. The court said, on page 496:

"The question presented for our consideration is, whether or not the plaintiff has a right of action based upon the negligence of the company in not ringing the bell or blowing the whistle. In other words, did the company owe it as a duty to the plaintiff to comply with the statutory requirement above specified? In order to justify a recovery, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect. (O'Donnell v. P. &. W. R. R. Co., 6 R. I. 211) It has been said: 'however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, * * * there is nothing which the law will redress.' (Bishop on Non-Contract Law, sec. 446.) In Sherman & Redfield on Neg. (4th ed., sec. 8), the doctrine is thus expressed: 'If the defendant owes a duty, but does not owe it to the plaintiff the action will not lie.' "

The only conclusion to be arrived at after a fair consideration of the evidence in this record is, that the accident was the result solely of the negligence of Mihas in [fol. 12-32] attempting to cross between the cars. The contention that he was relying uopn a supposed warning to the Sharps is absurd on its face. If such a thought ever entered his mind, he would have asked the Sharps if they had been warned. It is difficult to see how Mihas could have relied on such warning if he did not know whether or not it had been given. The plain fact is, that he gave no thought to the matter, but heedlessly went between the cars under such circumstances that it was out of the power of anyone to warn him.

We respectfully submit that the Appellate Court was in error in holding Mihas had the right to rely on the supposition that the Sharps had been warned of the switching operation, and in holding that the flying switch was a negligent operation on the part of the defenadnt.

Formal Prayer

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of this

Honorable court, directed to the Appellate Court of Illinois, within and for the First District, commanding said Appellate Court to certify and send to this court a full and complete transcript of the record and proceedings in the said Appelate Court in this cause, to the end that the said case may be reviewed and determined by this court, in accordance with the statute in such case made and provided.

William G. Wise, Attorney for Petitioner.

[fols. 13-15] [Caption omitted]

[fol. 16] In Superior Court of Cook County, October Term, A. D. 1926

Nick Mihas, Plaintiff,

vs.

Cheasapeake and Ohio Railway Company, a Corporation, Defendant

Trespass on the Case. Damages, $50,000.00

Præcipe for Summons—Filed July 22, 1926

The Clerk of the said Court will issue a Summons in the above entitled cause to said Defendant in a plea of trespass on the case to the damage of said Plaintiff in the sum of fifty thousand Dollars, direct the same to the Sheriff of Cook County to execute and make it returnable to the October Term of said Court, A. D. 1926.

Joseph D. Ryan, Plaintiff's Attorney.

To Samuel E. Erickson, Esq., Clerk, Chicago, July 22, 1926.

[fol. 17] IN SUPERIOR COURT OF COOK COUNTY

SUMMONS AND SHERIFF'S RETURN—July 22, 1926

442,329

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the Sheriff of said County, Greeting:

We command that you summon Chesapeake and Ohio Railway Company, a corporation, if it shall be found in your County, personally to be and appear before the Superior Court of Cook County, on the first day of the term thereof, to be holden at the Court House, in the City of Chicago, in said County on the first Monday of October A. D. 1926 to answer unto Nick Mihas in a plea of Trespass on the case to the damage of said plaintiff, as it is said, in the sum of Fifty Thousand Dollars ($50,000.00).

And have you then and there this Writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Sameul E. Erickson, Clerk of our said Court, and the Seal thereof, at Chicago, aforesaid, this 22 day of July A. D. 1926.

Sameul F. Erickson, Clerk. (Seal.)

(On back of summons:) Pd. 1.75; M., .10. Served this writ on the within name Chesapeake and Ohio Railway Company, a corporation, by delivering a copy thereof to C. A. Swenado, agent of said corporation this 23rd day of July 1926.

The president of said corporation not found in my country.

Peter M. Hoffman, Sheriff, by Thomas C. Buhman, Deputy.

[fol. 18] IN SUPERIOR COURT OF COOK COUNTY

[Title omitted]

DECLARATION—Filed Oct. 4, 1926

Now comes the plaintiff, Nick Mihas, by Joseph D. Ryan, his attorney, and complains of the above named defendant of a plea of trespass on the case.

First Count

For that whereas on, to-wit, March 16th, A. D. 1926, the said defendant was in possession and control of and operating as a common carrier by railroad various lines of steam railroad in and through the City of Peru, County of Miami and State of Indiana and in and between the State of Indiana and other States of the United States and as such common carrier by railroad the defendant was on, to-wit, the day and date aforesaid, engaged in interstate commerce; that at the said City of Peru, in the vicinity of Cass and First Streets the defendant, prior to and on the day and date aforesaid used and maintained, in the prosecution of its business as a common carrier by railroad in its interstate commerce, a certain freight house and loading platform, together with divers tracks, freight cars, locomotive engines and other instrumentalities of interstate commerce. And the said defendant, then and there, by reason of the premises, became and was subject to a certain Act of Congress known as the Federal Employers' Liability Act relating to the liability of common carriers by railroad to their employees while engaged in interstate commerce.

[fol. 19] And plaintiff avers that on, to-wit, the day and date aforesaid, at the place aforesaid, he was employed by and was at work for the defendant as a section hand in said interstate commerce and was, then and there, required, in the due course of his employment, to inspect and repair divers tracks, signalling devices and other instrumentalities used by the defendant in its interestate transportation; that said employment rendered it necessary for the plaintiff to be in and upon the premises aforesaid, at the place afore-

said, and to cross the said tracks aforesaid. And thereupon it, then and there, became and was the duty of the defendant to use reasonable care in the management of its said railroad and in the operation of its said engines and cars so as not to injure the plaintiff while he was lawfully engaged, as aforesaid, in the due course of his employment. And plaintiff further avers that the defendant, not regarding its duty in the premises, then and there, while the plaintiff was crossing one of the said tracks aforesaid, and while he was, then and there, in the exercise of ordinary care for his own safety, so carelessly, negligently wrongfully and improperly drove, managed, operated, propelled and kicked certain freight cars along and upon and over the said track aforesaid, that one or more of said cars, then and there, as a direct and proximate result of the negligence of the defendant, as aforesaid, ran upon and against and came into contact with the plaintiff and one of plaintiff's arms was thereby, then and there, so greatly crushed, broken, maimed and injured that it became and was necessary to amputate the same and he thereby, then and there, sustained severe and permanent injuries, both externally and internally and he was greatly hurt, bruised and wounded and divers bones in his body and limbs were broken, crushed and maimed and he thereby, then and [fol. 20] there, sustained divers and permanent injuries to his limbs, chest, abdomen and spine, and he sustained a severe and permanent injury to divers of his internal organs and a severe shock and injury to his nervous system and mental faculties, and he thereby, then and there, became sick, sore, lame, disordered and permanently crippled and so remains for a long space of time, to-wit, from thence hitherto, and will in the future so remain, during all of which time he suffered great pain and anguish in body and mind and will in the future so suffer and he was, by reason of his said injuries and permenently will be hindered and prevented from following his usual occupation and from attending to his affairs and duties and he was compelled to and he did expend and become liable for divers large sums of money, in and about endeavoring to be cured of his said injuries, as aforesaid, and he will in the future be obliged to lay out and expend divers large sums of money, in and about endeavoring to be cured of his said

injuries, sickness and disorders occasioned as aforesaid. To the damage of the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) and therefore he brings this suit, etc.

Second Count

For that whereas on, to-wit, March 16th, A. D. 1926, the said defendant was in possession and control of and operating as a common carrier by railroad various lines of steam railroad in and through the City of Peru, County of Miami and State of Indiana and in and between the State of Indiana and other States of the United States and as such common carrier by railroad the defendant was on, to-wit, the day and date aforesaid, engaged in interestate commerce; that at the said City of Peru, in the vicinity of Cass and First Streets the defendant, prior to and on the day and date aforesaid used and maintained, in the prosecution of its business as a common carrier by rail- [fol. 21] road in its interstate commerce, a certain freight house and loading platform, together with divers tracks, freight cars, locomotive engines and other instrumentalities of interstate commerce. And the said defendant, then and there, by reason of the premises, became and was subject to a certain Act of Congress known as the Federal Employers' Liability Act relating to the liability of common carriers by railroad to their employees while engaged in interstate commerce.

And plaintiff avers that on, to-wit, the day and date aforesaid, at the place aforesaid, he was employed by and was at work for the defendant as a section hand in said interstate commerce and was, then and there, required, in the due course of his employment, to inspect and repair divers tracks and other instruments of interstate commerce; that the defendant, then and there, provided and furnished for the use of the plaintiff and in connection with its interstate traffic a certain car commonly known as a speed car or speeder, by means of which the plaintiff moved from place to place along the defendant's lines, in the due course of his employment, and which said speeder, when not in use, was kept and housed in a certain building or shanty on the said premises aforesaid, that said employment, then and there, rendered it necessary for the plain-

tiff to be in and upon the premises aforesaid and to cross a certain team track upon which a long string of freight cars was, then and there, standing and being unloaded; that it, then and there, became and was necessary for the plaintiff, in the due course of his employment, to cross between certain of the said cars so standing on the said team track, as aforesaid. And plaintiff avers that on, to-wit, the day and date aforesaid and for a long time prior thereto it had been the established practice and custom of the defendant [fol. 22] and its employees to give due notice and warning to all persons in or about the said cars aforesaid, before moving or starting the same or before kicking, or shunting other cars in, upon and against the said cars, which said practice and custom the plaintiff, then and there, and prior thereto, knew, and relied upon. And thereupon it, then and there, became and was the duty of the defendant to give reasonable and timely warning to all persons lawfully in and about the said cars aforesaid that said cars were about to be moved or started, or that other cars were to be propelled, shunted or kicked upon and against them. And plaintiff avers that on the day and date aforesaid, while he was lawfully upon the premises of the defendant and while he was, then and there, in the due course of his employment crossing the said track aforesaid, and between certain of the said cars so standing upon the said team track and being unloaded, as aforesaid, and while he, the plaintiff, then and there, and at all times prior thereto, was in the exercise of ordinary care for his own safety, the said defendant, not regarding its duty in the premises, then and there, carelessly, negligently wrongfully and improperly, contrary to the established practice and custom, as aforesaid, and without notice or warning to the plaintiff and others engaged at work in and upon and about the said cars, moved, kicked, shunted and propelled other freight cars with great force and violence upon and against and into the said standing cars aforesaid, and one or more of said cars, then and there, as a direct and proximate result of the negligence of the defendant, as aforesaid, ran upon and against and came into contact with the plaintiff and one of plaintiff's arms was thereby, then and there, so greatly crushed broken, maimed and injured that it became [fol. 23] and was necessary to amputate the same and he

thereby, then and there, sustained injuries and damages as alleged in the first count of this declaration and which said injuries and damages as so alleged in the first count of said declaration are expressly made a part hereof.

To the damage of the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) and therefore he brings this suit, etc.

Third Count

For that whereas on, to-wit, March 16th, A. D. 1926, the said defendant was in possession and control of and operating as a common carrier by railroad various lines of steam railroad in and through the City of Peru, County of Miami and State of Indiana and in and between the State of Indiana and other States of the United States and as such common carrier by railroad the defendant was on, to-wit, the day and date aforesaid, engaged in interstate commerce; that at the said City of Peru, in the vicinity of Cass and First Streets, the defendant, prior to and on the day and date aforesaid used and maintained, in the prosecution of its business as a common carrier by railroad in its interstate commerce, a certain freight house and loading platform, together with divers tracks, freight cars, locomotive engines and other instrumentalities of interstate commerce. And the said defendant, then and there, by reason of the premises, became and was subject to a certain Act of Congress known as the Federal Employers' Liability Act relating to the liability of common carriers by railroad to their employees while engaged in interstate commerce.

And plaintiff aver that prior to and on, to-wit, the day and date aforesaid he was employed by and was at work for the defendant in said interstate commerce as a section hand, and in the due course of his employment the plaintiff was required to and did inspect and repair divers interstate tracks and highways and other instrumentalities used by [fol. 24] the *by the* defendant in the prosecution of its interstate commerce; that for the purpose of enabling the plaintiff to carry on the said work aforesaid, the defendant provided and furnished for his use a certain speed car or speeder which plaintiff used and operated, in the due course of his employment, in moving from place to place over the

defendant's lines; that said speeder was kept and housed in a certain building or shanty on the said premises aforesaid, and it, then and there, became and was proper and necessary for the plaintiff, in the due course of his employment, to cross a certain team track, which said team track was usually and customarily occupied by divers standing freight cars in the process of loading and unloading, in order to get to the said house or shanty aforesaid where the said speeder was kept and housed, as aforesaid. And plaintiff further avers that for a long time prior to the day and date aforesaid, it had been the established practice and custom of the plaintiff and other employees of the defendant to pass across and over the said team track aforesaid and to pass between or over the said cars, then and there, standing on the said team track aforesaid, all of which facts the defendant and its servants knew, or could have known had it exercised ordinary and reasonable care for the safety of the plaintiff. And plaintiff further avers that it was, then and there, and for a long time prior thereto had been, the established, recognized practice and custom of the defendant when said cars were standing on the said team track aforesaid, and while they were being loaded and unloaded, as aforesaid, to give due notice and warning to all persons in or about the said cars before moving or starting the same or before moving or propelling other cars with violence upon and against the said standing cars, which practice and custom the plaintiff was, then and there, familiar with and relied upon. And thereupon it, then and [fol. 25] there, became and was the duty of the defendant to warn and notify the plaintiff and other who might be lawfully upon or about the said cars aforesaid, or who might be lawfully crossing between the same, that cars were about to be moved or propelled against the said standing cars aforesaid, but the defendant, not regarding its duty in the premises, then and there, contrary to and in violation of the established practice and custom, and without notice or warning to the plaintiff, moved, kicked, shunted and propelled divers freight cars upon and against and into the said standing cars on the said team track aforesaid at a high, dangerous and excessive rate of speed and with unusual and unnecessary force and violence, while the plaintiff was, then and there, in the due course of his

employment, crossing over the said team track aforesaid and between the said standing cars aforesaid, at the place aforesaid, and one or more of said standing cars was, then and there, as a direct and proximate result of the negligence of the defendant, suddenly and violently moved, started and *h*erked and the plaintiff was, then and there, thrown or caused to fall to and upon the ground, track and adjacent premises and one or more of said cars, then and there, ran upon and against and came into contact with the plaintiff and one of plaintiff's arms was thereby, then and there, so greatly crushed, broken, maimed and injured that it became and was necessary to amputate the same and he hereby, then and there, sustained injuries and damages as alleged in the first count of this declaration and which said injuries and damages as so alleged in the first count of said declaration are expressly made a part thereof.

To the damage of the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) and therefore he brings this suit, etc.

Joseph D. Ryan, Attorney for Plaintiff.

[fol. 26] In Superior Court of Cook County

[Title omitted]

Pleas—Filed Oct. 26, 1926.

1. And the defendant, by William G. Wise, its attorney, comes and defends the wrong and injury, when, etc., and says it is not guilty of the grievances above laid to its charge, or any or either of them, in the manner and form as the plaintiff has thereof complained against it, in said declaration and each count thereof; and of this the defendant puts itself upon the country, etc.

2. And for a further plea in this behalf to plaintiff's said declaration and each count thereof, defendant say*d* that the plaintiff ought not to have its aforesaid action against it, the defendant, for the reason that the plaintiff, at the time of said supposed grievances alleged in his said declaration and each count thereof, was not in the exercise of due care and caution for his own safety, but was contributory negli-

gent in that he, the plaintiff, at the time of the accident set forth in the plaintiff's declaration and each count thereof, [fol. 27] was employed by the defendant as a section-hand at or near the City of Peru, in the State of Indiana; that at the time of the accident, the plaintiff, without regard for his own safety, and acting wholly without the scope of his employment, attempted, solely for his own convenience, to pass between and over certain freight cars then standing on a certain sidetrack of the defendant, and that while attempting to pass between said freight cars the plaintiff was injured; that it was not necessary for the plaintiff to pass between said freight cars in order to perform any duties or services in and about his employment by the defendant; that it was not necessary for the plaintiff to cross between said freight cars in order to reach a certain building or shanty, as alleged in plaintiff's declaration; that it had not, at the time of the accident, or prior thereto, been the practice and custom for the employees of the defendant to pass over and between cars standing on said side track, but, on the contrary, it was against the rules, long established by the defendant, for any of its employees to pass over or across any cars standing on said side track; that plaintiff had full knowledge of the fact that cars were constantly being switched on to said side track, and by reason of his attempt to pass between the cars then standing on said side track, the plaintiff was guilty of negligence which was the sole and proximate cause of the injury to him; and this the defendant is ready to verify.

Wherefore, it prays judgment, if the plaintiff ought to have his aforesaid action against it, etc.

William G. Wise, Attorney for Defendant.

[fol. 28] In Superior Court of Cook County

[Title omitted]

Order re Affidavit—Feb. 18, 1927.

On motion of plaintiff's attorney it is ordered that leave be and the same is hereby given the plaintiff to file his affidavit herein to advance this cause on the trial calendar

and the defendant be and is hereby required to file its counter affidavit thereto within five days from this date.
* * *

[fol. 29] In Superior Court of Cook County

[Title omitted]

Notice of Motion to Advance—Filed Feb. 18, 1927

To William G. Wise, 2006—77 W. Washington St., Chicago, Illinois:

You are hereby notified that on the 18th day of February, A. D. 1927, at ten o'clock A. M. or as soon thereafter as counsel can be heard, I shall appear before the Honorable Judge Marcus Kavanagh in the room then occupied by him as a Court Room in the courthouse, in the City of Chicago, County of Cook and State of Illonois and then and there, move the Court to enter an order advancing the above entitled cause upon the calendar and set the same for trial at an early date to be fixed by the Court, and in support of said motion I shall present the Affidavit of the plaintiff, Nick Mihas, a copy of which affidavit is herewith served upon you.

Joseph D. Ryan, Attorney for Plaintiff.

Received a copy of the above and foregoing Notice and of the Affidavit mentioned therein, this 17th day of February, A. D. 1927.

Wm. G. Wise, Attorney for Defendant.

[fol. 30] In Superior Court of Cook County

[Title omitted]

Affidavit of Nick Mihas

Nick Mihas being first duly sworn on oath, deposes and says that he is the plaintiff in the above entitled cause, that on, to-wit, the 16th day of March, A. D. 1926, while employed as a track inspector for the defendant, and while he,

in the due course of his employment, was in the act of climbing on top of a certain car in a string of cars, then and there, in the yards of the said defendant, the defendant, carelessly and negligently moved certain other cars upon and against said string of cars; that said cars were moved in the prosecution of the defendant's business; that said accident occurred in the City of Peru, County of Miami, and State of Indiana; that as a result of the careless and negligent operation of the cars as aforesaid, this affiant was thrown and precipitated with great force and violence against divers parts of the said car upon which he was climbing and to and upon the track and ground there, and he thereby sustained serious and permanent personal injuries; that as a result of said injuries his right arm was amputated at the shoulder; that several ribs were fractured and that he suffered severe injuries to his nervous system; said injuries totally disabling him from the performance of any work or labor.

[fol. 31] Affiant further states that the manner of the happening of the accident resulting in affiant's injuries is more fully set forth and described in his declaration filed herein.

Affiant further states that at and before the time of the accident described in said declaration, the defendant became and was subject to certain acts of Congress, known as The Federal Employers' liability Act, relating to the liability of common carriers by railway to their employees, while engaged in interstate commerce.

Affiant further states that he is the sole support of a widowed mother; that he resides at 6200 Montrose Avenue, Chicago, Illinois; that by reason of his serious and painful injuries which he received in said accident, he has been unable to do any work or earn any money since the time of said accident; and that at the present time his sole income consists of Twenty-five Dollars ($25.00), per month which he has been receiving under a policy of accident insurance; that the final payment due under this policy falls due March 16, 1927; that he is without funds and has no other source of income and possesses no property; that he has borrowed from friends to the extent of One Thousand Dollars ($1,000.00), all of which money has been expended in the support and maintenance of himself; that he has no friends

or relatives from whom he can procure further financial assistance.

Affiant further states that he is in need of immediate funds in order to procure further medical relief for the injuries sustained in the aforesaid accident.

Affiant further states that he attended school for two years while in Greece and since leaving the second grade he has had no further education; that because of the lack of education he is unable to obtain employment other than that of manual labor.

[fol. 32] Affiant further states that he has been advised by his attroney that he has a meritorious right of action against the defendant, which said right of action has been substantially set forth in his declaration heretofore filed in this cause.

Wherefore, this affiant prays that said cause may be advanced on the Calendar and set for trial at an early date, to be fixed by the Court.

Nick (his # mark) Mihas.

Witnesses to mark: Thomas S. MacKinley, Edmund M. Sinnott.

Subscribed and sworn to before me this 17th day of February, A. D. 1927. Thomas S. MacKinley, Notary Public. (Seal.)

[fol. 33] In Superior Court of Cook County

[Title omitted]

Affidavit of William G. Wise—Filed Feb. 24, 1927.

State of Illinois,
County of Cook, ss:

William G. Wise, being first duly sworn on his oath, says, that he is the attorney of record for the Chesapeake and Ohio Railway Company, a corporation, defendant in the above entitled cause; that the accident out of which said cause of action arose occurred on or about the 16th day of March, 1926, at or near the City of Peru, in the State of Indiana; that the plaintiff was a resident of the

City of Peru, State of Indiana; at the time of said accident; that the defendant, Chesapeake and Ohio Railway Company, was, at the time of said accident and still is, operating a railroad in and through the State of Indiana, wherein service of process can be had upon said defendant; that both of the parties to this suit were, at the time of said accident, residents of the State of Indiana.

Affiant further says that this action was begun by the plaintiff against the defendant on July 23rd, 1926, and is now pending in this court, being number 674 on Calendar No. 7 of this court.

William G. Wise.

Subscribed and sworn to before me this 21st day of February, A. D. 1927. John J. Dever, Notary Public. (Seal.)

[fol. 34] In Superior Court of Cook County

Order Advancing Cause—Feb. 24, 1927

On motion of plaintiff's attorney it is ordered that this cause be and is hereby advanced on the trial call and set for trial on April 4th, A. D. 1927, and, on motion of defendant's attorney it is ordered that leave be and the same is hereby given the defendant to file its bill of exceptions thereto within ten days from this date.

In Superior Court of Cook County

[Title omitted]

[fol. 35] Notice of Presentation of Bill of Exceptions—Filed March 3, 1927

To Joseph D. Ryan, attorney for plaintiff:

Please take notice that on Thursday, the 3rd day of March, A. D. 1927, at the opening of court, or as soon thereafter as counsel can be heard, I shall appear before his honor, Judge Kavanagh in the room usually occupied

by him as a court room, and present a bill of exceptions, and ask that same be signed and filed; at which time and place you may appear, if you see fit.

William G. Wise, Attorney for Defendant.

Received a copy of the above notice, this 2nd day of March, 1927.

Joseph D. Ryan, Attorney for Plaintiff.

In Superior Court of Cook County

[Title omitted]

Order Settling Bill of Exceptions—March 3, 1927

This day comes the defendant and presents to the court for approval its bill of exceptions herein, which said bill of exceptions is duly approved, signed, sealed and ordered filed.

[fol. 36] In Superior Court of Cook County

[Title omitted]

Bill of Exceptions—Filed March 3, 1927

Caption

Be it remembered that on the 24th day of February, 1927, the plaintiff, by Joseph D. Ryan, his attorney, moved the court to advance the trial of this cause and to set same for trial at an early date, and in support of said motion, read and filed the following affidavit, to-wit:

[fol. 37-39] [Title omitted]

Affidavit

[Omitted in printing; printed side page 30 ante]

[fol. 40] Affidavit in Cause for Hearing Opposition to Motion to Advance

[Omitted in printing; printed side page 33 ante]

[fol. 41] In Superior Court of Cook County

Order Settling Bill of Exception

And, thereupon, the court having heard the arguments of both counsel, thereupon entered an order advancing the trial of this cause, and set same for trial on April 4th, 1927, to which ruling and decision of the court the defendant, Chesapeake and Ohio Railway Company, by and through its counsel, then and there duly excepted.

And, forasmuch as the matters above set forth do not fully appear of record, the defendant, Chesapeake and Ohio Railway Company, tenders this, its Bill of Exceptions, and prays that the same may be signed and sealed by the Judge of this Court, pursuant to the Statute in such case made, which is done accordingly this 3rd day of March, A. D. 1927.

Marcus Kavanagh, Judge. (Seal.)

[fol. 42] In Superior Court of Cook County

[Title omitted]

Minute Entries

This cause being called for trial come the parties to this suit by their attorneys respectively and issues being joined it is ordered that a jury come, whereupon come the jurors of good and lawful men towit: Adolph Diez, L. L. Cochran, Wm. E. Kapelanski, L. H. Barter, Marshall V. Pahn, Luthert Emmert, Edward Barnes, A. C. Coquillette, Albert P. Klavunn, Wm. V. Haley, Frank Lyons and Geo. Phillips, who being duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence, and, the hour for ad-

journment having arrived it is ordered that said jury be permitted to separate until ten o'clock tomorrow morning. • • •

And afterwards, to-wit, on the 6th day of April A. D. 1927 the following proceedings were had and entered of record in said Court to-wit:

[Title omitted]

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impaneled herein for the trial of said cause also come and the hour for a*j*hournment having arrived it is ordered that said jury be permitted to separate until ten o'clock tomorrow morning. • • •

[fol. 43] In Superior Court of Cook County

Verdict—April 7, 1927

"We the jury find the Defendant guilty and assess the Plaintiff's damages at the sum of twenty thousand (20,000.00) dollars."

1. Geo. W. Phillips, Foreman. 2. E. F. Emmett. 3. E. Barnes. 4 Wm. V. Haley. 5. Wm. E. Kapelanski. 6. M. V. Palm. 7. H. Klavenin. 8. A. C. Coquillette. 9. F. J. Lyons. 10. A. W. Diez. 11. Lloyd L. Cochran. 12. Leonard H. Barter.

• • • • • • •

In Supreme Court of Cook County

[Title omitted]

Order Setting Motion for New Trial—April 7, 1927

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impanelled herein for the trial of said cause also come, and after hearing all of the evidence adduced, say:

"We, the jury find the defendant guilty and assess the plaintiff's damages *to* the sum of twenty thousand dollars."

Whereupon the defendant enters herein its motion for a new trial in said cause, which motion is hereby set for hearing on April 16th, A. D. 1927.

[fol. 44] In Superior Court of Cork County

[Title omitted]

Judgment—April 16, 1927

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause; after arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied to which the defendant excepts.

Thereupon the defendant enters herein its motion in arrest of judgment, which motion is also overruled to which the defendant excepts.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of Twenty Thousand Dollars in form as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor; and

The defendant having entered its exceptions herein prays an appeal from the above judgment of this court to the Appellate Court in and for the First District of the State of Illinois, which is allowed upon filing herein its appeal bond in the penal sum of Twenty Two Thousand Dollars to be approved by the Court together with its bill of exceptions both within sixty days from this date. * * *

[fols. 45-47] Bond on appeal for $22,000, approved and filed April 30, 1927, omitted in printing.

[fol. 48] IN SUPERIOR COURT OF COOK COUNTY

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS—Filed June 3, 1927

It is hereby stipulated and agreed, by and between the parties hereto, by their respective attorneys of record, that the original bill of exceptions in said action instead of a copy, may be incorporated in the transcript of the record for appeal to or a writ of error from the Appellate and Supreme Courts of the State of Illinois.

Joseph D. Ryan, Attorney for Plaintiff. Wm. G. Wise, Attorney for Defendant.

Dated May 28th, 1927.

[fols. 49 & 50] IN SUPERIOR COURT OF COOK COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—June 4, 1927

On motion of William G. Wise, attorney for the defendant, it is hereby ordered that the bill of exceptions in this cause, this day presented and signed and sealed by the court, be filed herein and become a part of the records in this cause. * * *

[fol. 51] IN SUPERIOR COURT OF COOK COUNTY

[Title omitted]

Bill of Exceptions—June 4, 1927

Be it remembered that heretofore, to-wit, on the 4th day of April, A. D. 1927, being one of the days of said term of said court, before the Honorable Marcus Kavanagh, one of the Judges of said Court, sitting on the common law side thereof, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Mr. Joseph D. Ryan appeared for plaintiff.

Mr. William G. Wise appeared for defendant.

[fol. 52] (Jury impaneled and sworn.)

(Opening statements made by counsel for the plaintiff and the defendant.)

And thereupon the plaintiff, to maintain the issues on his behalf, introduced the following evidence, to-wit:

WILLIAM SHARP, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your name, please?

A. William Sharp.

Q. Will you speak up loud so counsel may hear you without effort, Mr. Sharp?

A. William Sharp.

Q. Where do you reside?

A. Peru, Indiana.

Q. How long have you lived in Peru, Indiana?

A. Well, I am fifty-nine years old; you can figure it out.

Q. You have lived there all your life?

A. All my life.

Q. Up to date. What is your business?

A. I am a contractor, sand and gravel.

Q. I didn't hear that. A Sand and gravel contractor.

The Court: Sand and gravel contractor.

Mr. Ryan: Yes, your honor.

Q. Where did you live in Peru in March, 1926, about a year ago?

A. On East River street, 131.

[fol. 53] Q. Do you know what you were doing on the 16th of March, 1926, on the morning of that day?

A. I was unloading some coal.

Q. By what means?

A. Well, sir, a fellow wanted a carload of coal unloaded.

Q. I know, but how were you unloading it? By what? By what means?

A. Oh, a truck.

Q. Who was helping you, if any one?

A. My son.

Q. Who operated the truck?
A. My son.
Q. Where were you unloading this coal from?
A. Down there on the C. & O.
Q. You mean the Chesapeake & Ohio?
A. Yes, sir.
Q. The defendant in this case?
A. Yes.
Q. And whereabouts was the coal car located that you were unloading the coal from?
A. Well, Sir, it was on track number 3.
Q. Do you know what they call that track?
A. It is the—I can't think of it now.
The Court:
Q. Team track, is it?
A. Team track, yes.

Mr. Ryan:

Q. Now how do the tracks extend there, in what direction, in the yard?
A. East and west.
Q. And what is the name of the street running parallel with these tracks and just north of the railroad premises?
A. Why, they call it Canal street.
Q. Do you know where the little house is on the north side of the yard where the railroad section men live?
[fol. 54] A. Yes, it is down west of the freight office.
Q. How far west of the freight office is that little house?
A. Oh, a couple of hundred feet or more.
Q. And where is the house located with reference to the north side of the yard or Canal street that you mentioned?
A. How is that?
Q. I say, where is the house with relation to Canal street? How far south of Canal street is it?
A. Well, it is a little ways.
Q. What do you mean by that, a few feet?
A. Yes, away from Canal street.

The Court:

Q. About how many feet?

Mr. Ryan:

Q. How many feet does it set back south?
A. Oh, it sets back about six or eight feet, I expect, something like that.

Q. And is that little house on the railroad yard?

A. Yes, sir.

Q. Now then, is this number 3 team track the first track that you come to in going south in the yard from Canal street?

A. Yes.

Q. And you say the house is about two hundred feet west of the freight house, is that right?

A. Yes, more or less. I couldn't tell you just exactly.

Q. And which way is the freight house from Canal Street?

A. Why, it is south of Canal street.

Q. Now will you describe if there is a loading platform extending toward the west from that freight house?

A. Yes.

Q. How far does the loading platform extend west of the freight house proper, in your judgment?

[fol. 55] A. Well, I couldn't—150 feet, along there.

Mr. Wise: What did he say?

Mr. Ryan: About 150 feet. Is that what you said?

The Court: No, he said 250, wasn't it?

The Witness: No, 150 feet.

The Court: More or less.

Mr. Ryan:

Q. Keep your voice up. It is hard to hear you.

A. All right.

Q. Now just next to this team track extending in an easterly and westerly direction, what is there in the yard? What is the next track?

A. Why, that there is the track that runs up into the brick yard.

Q. Well, does that track stop at the freight house, number 2, number 2 house track?

A. No.

Q. Well, going east that track stops at the freight house, does it not?

A. There is one stops there; I don't know which.

Q. Well, the one next to number 3, going south you come to team track number 3 first, don't you?

A. Yes.

Q. Then next is a house track, is it not, alongside of this platform?

A. There are three tracks there.

Mr. Wise: Your Honor, I want to object. Counsel is leading.

The Court: Of course, he is leading, but I assumed there would probably be no dispute about the location of the tracks. If there is any question——

[fol. 56] Mr. Wise: All right, your Honor.

Mr. Ryan:

Q. Mr. Sharp, will you tell the court and jury what the second track is, what you call it there in the yard and where it ends at the east?

A. It goes up to a kind of a little brick yard.

Q. That is number 3 you are talking about, aren't you?

A. Well, 2 then.

The Court:

Q. What is the first track you come to, Mr. Sharp, when you are walking south?

A. Well, that there is the team track.

Q. Is that number 1, 2 or 3?

A. 3, I think.

Q. That is number 3 and what is the next?

A. The next is 2.

Mr. Ryan: That is my mistake.

Q. Then the next track south is number 2, is it?

A. Yes.

Q. Where does that stop at the east?

A. Well, it goes up into a kind of a little brick yard where they unload brick, Clifton yard there.

Q. Well, you never worked in the railroad yard, did you?

A. No, sir.

Q. What is your idea as to the next track south of number 1 track? Where is that located?

A. Well, that is up agin the freight office.

Q. Is that south of this loading platform I have been asking you about that extends west from the freight house?

A. No, no.
Q. Sir?
A. It runs beside of that, you know.
Q. Along the south side?
A. The north side.

The Court:

Q. You are walking south. You pass over, as I understand it, the team track. Then you pass over the house track?
A. Yes.
Q. Then you come to this loading track which runs along side of the freight house north of the freight house?
[fol. 57] A. Yes.

Mr. Ryan: Your Honor, I will have it explained by some other witness that knows more about it.

Q. This number 2 track going south runs alongside of and on the north side of that loading platform, does it not?
A. No, you don't go along the platform.
Q. All right. Where does number 3 track go?
A. Up agin the platform, alongside of the platform.
Q. Is it your understanding that number 3, 2 and 1, are north of the loading platform?
A. Yes.
Q. Sir?
A. Yes.
Q. Well, are you sure of that, Mr. Sharp?
A. Well, that is the way I have got it in my head, anyway.
Q. All right.

The Court: He has evidently got the warehouse, the freight house on the side of the track from the yards opposite where you have.
Mr. Ryan: Your Honor, I will straighten it out later. In any event there is no confusion or dispute about where number 3 track is.

A. No.
Q. Where does number 3 track extend toward the west from this place?

A. Why, it runs on up to the heating plant across Canal street.

Q. Now on the morning in question when you were unloading coal out of this coal car where was the coal car standing with relation to this little house we have been talking about?

[fol. 58] A. Well, it was setting just about back of it.

Q. When you say back, what direction?

A. Back, south of the house.

Q. Now had you loaded more than one load of coal out of that car that morning?

A. Yes, I was on my second load.

Q. All right. Do you know about what time you unloaded your first load that morning?

A. Along about six o'clock, I guess.

Mr. Wise: What is that?

(Answer read.)

Mr. Ryan:

Q. We want to hear everything you say and if you lower your voice, we cannot hear. About what time did you load the first load?

A. Well, we got away about a quarter after five when we loaded up.

Q. Did you shovel the coal out of your car into your truck?

A. Yes, sir.

Q. How much coal did your truck hold?

A. About thirty-six hundred.

Q. After you loaded the first load, the first time, commencing at a quarter after five, where did you go with the load?

A. I went up in the country.

Q. How far in the country?

A. About three mile and a half.

Q. And what did you do with your load up there?

A. Dumped it off.

Q. Then what did you do?

A. Come back.

Q. Well, after you dumped it off did you shovel it in somewhere?

A. No, didn't shovel that load in.

Q. What is that?

A. We didn't shovel that load in.

Q. All right. Then you came back, and what did you [fol. 59] do then, the second time?

A. We loaded up another load.

Q. Was the coal car standing in the same place?

A. Yes.

Q. What was on the track, what was on that team track besides this coal car when you loaded on that coal?

A. Well, I couldn't tell you. There was a lot of cars there.

Q. Well, that is what I am getting at. Which way did the cars extend from the coal car?

A. Why, both ways.

Q. Both east and west?

A. Yes.

Q. Do you know about how far it is from where you were loading that coal up toward the west where the track curves on to the main line or on to the lead?

A. No, I don't.

Q. Well, about? You know about how far it is, don't you?

A. You mean east?

Q. No, I don't. I mean west, Mr. Sharp.

A. West.

Q. You know that track extends along toward the west?

A. Yes.

Q. And then curves on to the southwest on to the lead and main track, does it not?

A. Oh. It might be a couple of hundred feet down there. I don't know. I didn't pay much attention to it. Something like that.

Q. Could you approximate the number of cars that were on this track when you were unloading there, toward the west and toward the east of the coal car?

A. No, I couldn't. There was a string of cars there.

Q. Did the string extend in both directions?

A. Yes, sir.

[fol. 60] Q. Now what did you do after you loaded up the second time?

A. Just got our truck started and got away about, oh, thirty, forty feet, and I heard a big crash.

Q. Where did you hear the—what was this big crash that you heard?

A. Why, the cars switched together in there.

Q. Switched in where?

A. Agin where the coal car we was unloading, on that bunch of cars there.

Q. And just before you heard that crash had you been unloading coal there?

A. Yes, sir.

Q. Did you see——

The Court:

Q. How long before?

A. Well, we just got loaded and started our truck up and got away there about thirty or forty feet when this happened.

Q. About how many minutes or seconds?

A. I suppose it was about five minutes after we got out of the car.

Mr. Ryan:

Q. Did it take you five minutes to go thirty or forty feet?

A. Well, the time we got started, sometimes the truck don't start very quick, you know.

Q. How long did it take you to drive from the side of that coal car thirty or forty feet?

A. Oh, it didn't take us very long.

Q. A few seconds?

Mr. Wise: I object to that.

The Court: Objection sustained.

A. A couple of seconds.

Mr. Wise: I don't think counsel ought to lead.

Mr. Ryan:

Q. Well, about how long after you got your load on [fol. 61] and got started away with your truck, how long was it after you got your truck started before you heard this crash?

A. Oh, it wasn't only a couple of seconds.

Q. Now can you describe to the court and jury what kind of a crash you heard?

A. Well, it was an awful crash, what I call it, because I turned around to the boy and I says, "My goodness, it is a good thing we got out of there." I says, "we would have got hurt."

Mr. Wise: I move that be stricken.

The Court: That is stricken out.

Mr. Ryan:

Q. Mr. Sharp, had you been familiar with that yard and the conditions there for some years before this time?

A. Yes.

Q. Did you know at the time you heard this crash or immediately thereafter that anybody had been hurt?

A. No.

Q. You didn't see the man that was injured?

A. No, sir.

Q. At any time before the accident? Did you come back again to get another load of coal that morning?

A. Yes.

Q. And did you at any time on your third trip hear about the accident?

A. Yes, I heard about it when I come back, some fellow come——

Q. Don't tell us what was said. You did learn?

A. Yes.

Q. Did you know that man that was injured? This Nick?

A. No, I didn't know him.

Q. When you came back the third time, what was the position or location of this coal car?

A. Oh, it was standing up about three cars further east. [fol. 62] Q. Now had you been unloading cars from that team track before this time?

A. Yes.

Q. For how long a period of time had you been familiar with conditions there?

A. Well, been a good while, I don't know, a few loads of coal and brick once in a while, whenever I had time to let the truck go.

Q. State whether or not there was any practice or custom, any uniform practice and custom with reference to what was to be done before cars were moved on that team track, kicked in there?

Mr. Wise: I object to that.

A. The brakeman is supposed to come and tell you.

The Court: He may answer, if he knows.

Mr. Ryan:

Q. Do you know, Mr. Sharp. I want you to understand the question first.

A. Yes.

Q. Was there any custom or practice with reference to what was to be done before cars were moved on that team track? Just answer yes or no.

A. Why, yes.

Q. Now what was the uniform practice and custom prevailing there during the months and years that you were unloading with reference to what was to be done before cars were kicked or moved on that team track?

Mr. Wise: I object to that.

A. They would come around and tell you.

The Court: Wait a moment. What is the objection?

Mr. Wise: It has nothing to do with the injury in question here.

[fol. 63] The Court: What?

Mr. Wise: It has no relation to this matter that we are trying in this case. What the custom is when they were unloading cars is not pertinent to the situation here, because this man was not unloading cars or was not doing any work in or about the cars.

The Court: I think I will let him answer.

Mr. Wise: Exception.

Mr. Ryan:

Q. You may answer, Mr. Sharp. What was the practice and custom?

A. Why, they always came up and told us to look out, that they was going to run some cars in there; always notified us.

Mr. Wise: I move that be stricken out, "they always notified us".

The Court: Overruled.

Mr. Ryan:

Q. Did you when you started your truck away—oh, by the way, when you unloaded the coal from the coal car into the truck what was the position of our truck with reference to the coal car? Was it backed in or alongside of it?

A. Alongside of it.

Q. At the time you started your truck away from the side of that coal car, state whether or not you heard any warning or any noise of any kind that cars were approaching or being kicked in on that track.

A. Not until I got away about fifty feet, I heard it.

Q. You heard the crash then?

A. Yes.

Q. Well, I was not asking you about the crash then.

A. No.

Q. When you started away from the side of that coal car did you hear any noise, any signal of any kind?

[fol. 64] A. No.

Q. Or any warning or notice that cars were being moved in there?

A. No.

Q. What is the nearest street extending north and south to this little house that we have been talking about?

A. Cass street.

Q. And which way from the house is Cass street, east or west?

A. West.

Q. What time in the morning did this crash occur that you are talking about?

A. Oh, it was along about ten minutes to seven.

Mr. Ryan: You may cross-examine.

Cross-examination.

By Mr. Wise:

Q. Did you see Nick Mihas that morning?

A. Did I see him?

Q. Yes.

A. I saw him out there in the yard once.

Q. What is that?

A. I seen some fellow out in the yards, I didn't know who it was, once.

Q. Did you see this man, the plaintiff in this case, that morning at any time?

A. I couldn't tell you. I didn't pay any attention. I just saw a man.

Q. You got there about five o'clock when you took out the first coal?

A. Something like that, I think so.

Q. Did you see him around there at that time?

A. No, I didn't see him then.

Q. Did you see him when you came back to get the second load?

A. Yes.

Q. He was where?

A. He was in the back part there, in the yards.

[fol. 65] Q. What yard?

A. Of his, feeding his chickens, or something. I don't know what he was doing.

Q. Did you know him at that time?

A. No, sir.

Q. You don't know whether that was he or not?

A. No, sir.

Q. It might have been somebody else there?

A. I don't know who it was.

Q. When you drove away that second time, when you heard the crash, which way did you go? Which way were you going?

A. I was going east.

Q. Going towards the east?

A. Kind of northeast, getting away further from the car, to drive out Canal street.

Q. You were going to the east, not west?

A. No.

Q. What kind of a car was next to the coal car you were taking the coal out of?

A. Box car.

Q. The box car was on the west?

A. Yes,—east side.

Q. Were there any cars on the west of it?

A. Yes, sir, there was cars on the west of it.

Q. You say the box car was on the east of it?

A. Yes.

Q. What kind of a car was on the west of it?

A. I don't know. I just happened to think about the box car setting there when we were loading up. I didn't pay any attention to the other cars.

Q. You didn't hear anything of the accident when you were within fifty feet and you heard the crash, did you hear anybody say anything?

A. No, I didn't.

Mr. Ryan: I object to the assumption in the question, [fol. 66] You- Honor. He said thirty or forty not fifty.

The Court. Whatever distance it was when you heard the crash.

Mr. Wise: Forty or fifty. All right. So you knew nothing at all about the accident?

A. No, not till I come back.

Q. How often had you unloaded coal or other things on that team track around about that time? Had you been there the day before?

A. The day before?

Q. Yes.

A. No.

Q. Had you been there during the month of March except this one coal car?

A. That was the only one.

Q. What.

A. That was the only load I unloaded last winter.

Q. That was the only load you had all winter?

A. That was the only load I took off last winter there.

Q. You had not been there for a number of months except on this one occasion?

A. Oh, yes, I had been a number of times, for the school house, or something.

Q. I say, for a number of months you had not been unloading there except on this one car?

A. It might have been two or three months, something like that.

Q. That was the only car you unloaded that winter?

A. No, not that winter.

Q. I understood you to say that.

A. I said two or three months, coal.

Q. Was there anybody else around there unloading?

A. No, I didn't see anybody.

Q. Didn't see anybody. Did you see any men in the yards working?

A. No.

[fol. 67] Q. Any of the crew or engines or the other cars being switched, or anything like that?

A. No, I wasn't looking for them. I was tending to work there. I was loading up.

Q. Were any engines or freight cars being switched up and down the other tracks?

A. I seen them working down there. I didn't pay any attention to them. I supposed if they were going to switch anything up there they would come up and tell me.

Q. Now you said it was the custom there to notify you in case you were unloading anything when they kicked cars in on the track?

A. Why, it is the custom in any place.

Q. I am asking you if it is the custom at this place?

A. It has been every time I have been there.

Q. Did anybody come to notify you at this time when you were unloading your load?

A. My first load?

Q. Yes.

A. No, nobody came in to bother me.

Q. Was there anybody came there when you were unloading your second load?

A. No, sir.

Q. Did anybody at any time you were ever unloading any cars on that switch track come to notify you that they were going to kick cars in there?

A. Yes, sir.

Q. Who would it be?

A. I couldn't tell you who they were; it was a brakeman.

Q. What did he say?

A. He said, "You want to look out; we are going to switch in here."

Q. That is when you had your truck or wagons up to the car unloading?

A. Yes, sir, and we was in the car unloading them out.
[fol. 68] Q. And this custom that you are talking about applies to men, people who were unloading cars, is that right?
A. How is that?
Q. People who were unloading cars?

Mr. Ryan: If your Honor please, I object to having him pass upon whom it applies to. A custom is a custom.
Mr. Wise: So far as he is concerned.
The Court: He may ask. It is cross-examination.
Mr. Ryan: I object, your Honor.

Mr. Wise:

Q. I say, this custom you have spoken about applies to people who were unloading cars?
A. Anybody around there, dangerous, yes.
Q. When teams or trucks are there unloading cars, if they are going to put in freight cars?
A. Yes, sir.
Q. They come and tell the people that are unloading?
A. Yes, sir.
Q. That is the custom what you mean?
A. Yes, sir.

Mr. Wise: All right. That is all.

Redirect examination.

By Mr. Ryan:

Q. Mr. Sharp, was any movement of these standing cars made, any kicking in done while you were unloading the first time?
A. No.

Mr. Ryan: One thing I forgot to ask. I would like to ask it now, your Honor.

Q. Was this string of cars all together? Were they coupled together or not, do you remember?
A. Coupled together.

Mr. Ryan: All right: They were couples together. That [fol. 69] is all.
Mr. Wise: That is all.

EDWARD SHARP, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. You may be seated. You have been sworn, have you not?

A. Yes, sir.

Q. What is your name?

A. Edward Sharp.

Q. And you live in Peru, Indiana?

A. Peru, Indiana.

Q. Are you the son of the man who was just on the stand?

A. Yes, sir.

Q. Are you in business with your father there in Peru, Indiana?

A. Yes, sir.

Q. Calling your attention, Mr. Sharp, to the morning of March 16, 1926, do you know what you were doing that morning?

A. Hauling coal.

Q. Where were you hauling the coal from?

A. From between the river and Canal street, west of the freight house.

Q. Mr. Sharp, are you familiar with that railroad yard and the tracks there?

A. Yes, sir.

Q. Are you sure you are familiar with it?

A. Well, with the tracks west of the freight house.

Mr. Ryan: Mr. Wise, you stop me if I lead him on this, but there is no dispute, I guess.

[fol. 70] Q. This yard is south of Canal street, is it not?

A. Yes, sir.

Q. South of Canal and Canal runs parallel with the tracks?

A. Yes, sir.

Q. Now where is the freight house located with reference to Cass street?

A. Well, it is east of Cass street.

Q. Do you know where that little house is that was on the railroad yard just south of Canal street where some of the section men live?

A. Yes, sir.

Q. And where is that with relation to the freight house, would you say?

A. It is west of the freight house.

Q. About how far?

A. But there is a platform runs down there.

Q. I don't mean the platform; I mean the freight house itself?

A. The freight house itself.

Q. Yes, sir.

A. Well, it is just about a block.

Q. Well, do you mean—of course your conception of a block may not be the same as ours.

A. No, that is true.

Q. In feet, how far would you say it was?

A. Well, it would be—I don't know just how far, it would be three or four hundred feet away. It would be that far.

Q. Where was the freight house with reference to Canal street?

A. It is south of Canal street.

Q. And this little house that I called your attention to, is that just south of Canal street?

A. Yes, sir.

Q. Now extending west from the freight house what was there, if anything?

A. Well, there was—there is a platform and then there was a string of cars down west.

[fol. 71] Q. I want to get the permanent physical objects first. There was a platform extending west from the freight house?

A. Yes, sir.

Q. How far did that loading—was that what you call a loading platform?

A. Well, yes, that is what you would call it, I guess.

Q. How far did it extend west from the freight house?

A. Well, I don't know just how far, but it would be around ninety feet from the house, east of the house.

Q. That is, extended from the station to a point about ninety feet east of the little house?

A. East of the little house.

Q. On the railroad?

A. Yes.

Q. Now was that platform up above the surface of the ground or not, any part of it?

A. Yes, sir.

Q. Will you describe the physical appearance of that platform?

A. Well, it would stand up probably that high (indicating).

Q. How many feet? You see I cannot see.

A. Well, that would be three or four feet.

Q. Well, was that platform three or four feet above the surface of the ground or tracks all the way along to the west end, or did it slope down toward the west end?

A. Well, it sloped down from the west end.

Q. And gradually attained a height of three or four feet?

A. Yes, sir.

Q. And then extended up to the end of the freight house?

A. Yes, sir.

Q. Now do you know how wide that platform was, I mean from north to south, that loading platform, approximately?

A. Well, I couldn't hardly say to that, just how wide it [fol. 72] is. I wouldn't say to that.

Q. You would not want to estimate that?

A. No.

Q. Now Mr. Sharp, commencing at Canal street going south, what was the first track that you encounter?

A. Team track.

Q. What did you call it? Do you know the number of it?

A. Number 3.

Q. And where did that track extend to toward the east?

A. It went on up by the freight house and through the brick yard and around across Canal street over there to the heating plant.

Q. Well, at the little house that I called your attention to the track extended directly east and west, did it?

A. The house?

Q. No, the track.

A. Oh, the track, yes.

Q. Now how far east did it extend before it curved over to the northeast?

A. Well, it is better than a block. It would be just about a block, three or four hundred feet, right around there. It would be that much anyhow. I know that.

Q. Did that track extend to the east beyond the north side of the freight house?

A. By the freight house and around through the brick yard and across.

Q. But it was on the north side of the freight house?

A. Yes.

Q. Now then, what is your understanding of the number of the track just south of the team track, number 3?

A. Number 2.

Q. Yes, and where did that track end going east, do you know?

A. Well, up at the end of the freight house.

[fol. 73] Q. That is that track extended on toward the east and stopped at the freight house, did it?

A. Yes.

Q. And what was immediately alongside of that second track and to the south of it?

A. What was what?

Q. I say, what was just south of that track?

A. Well, there is the freight house and then the loading platform.

Q. In other words, if there were cars on number 2 track they would be on the north side of this loading platform that you have described?

A. Yes, sir.

Q. Now Mr. Sharp, how far did that number 3 team track extend to the west of this little house that we have been talking about?

A. Well, I don't know.

Q. Well, where did it end? Where did that track end, team track number 3, at the west end? Do you understand my question?

A. I understand your question all right, but I am just trying to think where it did come out.

Q. Well, did it lead onto the main line? That is what I am getting at.

A. Yes, sir.

Q. That is, it went west some distance and then curved onto the lead track and onto the main line?

A. Yes, sir.

Q. What is your judgment of the distance from the little house we have been talking about to where the track curved and connected with the main line track?

A. Let us see. I don't know. It is a good—it is a pretty [fol. 74] good distance, though. It is, I don't know how many cars it would hold.

Q. Well, can you tell us in feet about how far it is?

A. I am afraid my judgment would be away off there, on the east part.

Q. Well, I don't want you to guess at it.

A. Well, I am not going to say then because I don't think I could tell you correct, see?

Q. All right. Now going on south, what was the track just south of this loading platform? Number 2 is the one north of it. What is the next track going south?

A. That is number 1.

Q. What do you call that track?

A. That would be the house track.

Q. Number I house track?

A. Yes.

Q. Number 2 and then number 3 going north, number 3 team track?

A. Yes, sir.

Q. What time did you start to unload your coal that morning?

A. To unload off the car?

A. Yes sir.

A. Well, it was around about five o'clock.

Q. Who did the work of unloading?

A. Him and I both, my father and I both.

Q. How did you place your truck when you unloaded the car?

A. It was headed east.

Q. Was it alongside of and parallel to the car?

A. It was along by the side of the car.

Q. And at the time you came there and commenced unloading coal, what was on the track there besides this one coal car, if anything?

A. Well, there were a string of cars.

Q. Which way did they extend from the coal car?

A. Both ways.

[fol. 75] Q. Where they standing or moving?

A. They were standing.

Q. Did they at any time while you were unloading move?

A. No, sir.

Q. Were any cars kicked in there while you were unloading the first time?

A. No, sir.

Q. What did you do with the load?

A. What did we do with it?

Q. Yes, sir.

A. We took it up in the country.

Q. And then what did you do?

A. Unloaded it.

Q. Then what did you do?

A. We drove back down to the car.

Q. Did you come back to this coal car again?

A. Yes, sir.

Q. Where was the coal car standing with reference to the little house that we have been discussing?

A. Well, the east end of the coal car was standing about direct back of the house.

Q. That would be, when you say back of it, you mean south of it?

A. South of the house, yes, sir.

Q. And then after you returned for your second load, what did you do?

A. We loaded up.

Q. You and your father did the work?

A. Yes, sir.

Q. During all that time were the cars standing there?

A. Yes, sir.

Q. These cars that you say extended in both directions?

A. Yes, sir.

Q. What next occurred after you got your load on?

A. Well, I started away and got thirty or forty feet and heard a severe crash.

Q. Where did the crash come—or what made the crash?

A. These cars.

[fol. 76] Q. Do you know which end the kick was made from or the movement was made from?

A. From the west end.

Q. Can you describe the noise or the violence of that crash a little more definitely?

A. Well, it was a load enough crash that my truck makes an awful lot of noise and I heard it, and I kind of—just kind of glanced out to the back.

Q. Don't tell us what anybody said. That is not competent. Did you see what effect the crash had on the standing cars in this long string of standing cars?

A. Well, it pushed them on east.

Q. How far?

A. Well, about three or four carlengths.

Q. By the way, did you know this man by sight from being around there, Mr. Sharp?

A. Just by sight but not personally.

Q. You didn't know his name?

A. No.

Q. And you were not in any way familiar with him?

A. No, sir.

Q. By the way, did you ever work for the Railroad Company?

A. Yes, sir.

Q. For the Chesapeake & Ohio Road?

A. Yes, sir.

Q. When, Mr. Sharp?

A. Well, I think that I hired out in 1918. I think I did, see? Well, I went on the Wabash in 1917, so I worked on both roads at the same time, and I just can't remember.

Q. How long were you engaged by this road?

A. Well, I was probably there a year.

Q. Sir?

A. Probably a year, I don't know just how long.

Q. What did you do for the road?

A. I fired.

Q. Did you ever act as a brakeman or switchman?

[fol. 77] Well——

Q. I mean for this road?

A. I hired out——

Mr. Wise: Who are you talking about, the Wabash?

Mr. Ryan: No, I should have said the Chesapeake & Ohio.

A. The C. & O. I hired out when I got laid off——

Q. I don't care about that.

A. Well, I mean what about the brakeman was, I hired out, my student trip, went out and back in, and then I didn't stay with them, see, so I went to firing. That is as much——

Q. What I am getting at, were you familiar with the conditions around the premises and yard in question?

A. Well, it is always customary for——

Q. No, wait a minute. You see you are not answering my question, Mr. Sharp. I asked you if you were familiar with conditions and customs around there about moving cars?

A. Yes, sir.

Q. Did you assist your father at any time in the work of unloading cars on that team track?

A. Yes, sir.

Q. Did you do that a good many times before this day or not?

Mr. Wise: If the court please, I object to that.

The Court: I think he may answer.

Mr. Wise: A good many times, I think that is leading.

The Court: Oh, well, you may cross-examine him, as to what he means by it.

Mr. Ryan:

Q. Tell us about that, will you, Mr. Sharp?

A. I didn't just get your question.

Q. Well, I will ask another one. Did you ever unload cars besides this morning in question?

A. Yes, sir.

Q. Did you do that frequently or not?

A. Well——

[fol. 78] The Court:

Q. About how often?

A. It was just once in a while we would, like we would have a carload of brick or something like that, you know, why, we would unload it.

Mr. Ryan:

Q. State whether or not there was any practice or custom about what was to be done before switching or moving these

cars that were standing on the team track when men were unloading cars?

A. Well, there was——

Q. Was there, first a practice and custom?

A. Yes, sir.

Q. What was it?

Mr. Wise: I object to that, if the court please.

The Court: He may answer.

Mr. Wise: It has no hearing on this matter.

The Court: I think he may answer.

A. For the brakeman to come down and warn you and see that anybody was around there, if they were going to come in and pull some cars out or throw some in, to come down and warn you to get away.

Mr. Ryan:

Q. Did you ever at any time when you were unloading cars, see them kick cars in or move cars suddenly without notice or warning to the men unloading cars or in around and about the cars?

Mr. Wise: I object to that, immaterial.

The Court: You may state what was done, in a general way.

Mr. Ryan: Well, I think he answered, your Honor. My last question was going a step farther.

Q. You have already said there was a practice.

A. Yes.

Q. Now I say, did you ever at any time see any violation of that practice or custom?

[fol. 79] A. Yes, sir.

Mr. Wise: I object to that.

The Court: Sustained.

Mr. Ryan: Then I suppose the answer may go out, your Honor?

The Court: Yes.

Mr. Ryan: I don't think the witness understood my question.

Q. After you had loaded the truck the second time, Mr. Sharp, what did you do?

A. We drove away from the car.

Q. And did you go on with your load?

A. Yes, sir.

Q. Did you know at the time that you heard the crash or before you returned back to the car again that Nick Mihas had been hurt?

A. Not at the time we drove away. When we came back why——

Q. It would not be proper to tell what anybody told you, but you did learn then about this man being hurt?

A. Yes, sir.

Q. And did you unload any coal from that same car the next time you returned, the last time?

A. Yes.

Q. Where was the car standing with reference to the little house when you loaded up the third load?

A. Well, it was three or four car lengths east of the house.

Q. Do you know where the main line of the road is with reference to the freight house?

A. The main road you mean?

Q. The main line, yes, the main track?

A. Yes, sir.

Q. Where was it with reference to number 1 house track?

A. South.

[fol. 80] Q. And then what was next to the main line track that was south of that?

A. The siding, side track.

Q. The siding was, commencing at the south going north you have first a side track, have you?

A. Yes, sir.

Q. Then the next track—now I am going from south to north—is the main line, is that correct?

A. Yes, sir.

Q. Then you have number 1 house track?

A. Yes.

Q. Which extends along the south side of this loading platform?

A. Yes, sir.

Q. Then you have number 2 house track extending along the north side of this loading platform up to the end of the freight house?

A. Yes, sir.

Q. Then you have number 3 team track extending from some distance to the west?

A. Yes, sir.

Q. And from the main line and lead track down toward the east and down beyond the feright house and across Canal street?

A. Yes, sir.

Q. And these were the only tracks in that yard?

A. Yes, sir.

Q. Mr. Sharp, did you notice on the morning of this accident whether or not there were cars on number 2 house track?

Mr. Wise: I object to that.

The Court: He may answer.

A. No, sir, I did not.

Mr. Ryan:

Q. Q. That is, you didn't notice?

A. I never paid no atention.

Q. After you had loaded your load there, Mr. Sharp, and [fol. 81] got your engine started—did you have a self-starter?

A. No, sir.

Q. Or did you have to crank it?

A. Had to crank it.

Q. After you cranked your car and got in your truck how long was it afterwards—how long did it take you to move that thirty or forty feet in time?

A. Well, it wouldn't take very long, a minute or two.

Q. What?

A. You mean to crank it up and all?

A. No, I didn't mean that. How long did it take you to drive thirty or forty feet?

A. Well, that wouldn't take no time at all. It wouldn't take a minute.

Q. Did you hear any warning or was any notice given to you or your father that cars were about to be kicked in or were being kicked in or pushed in or moved in on that track before you started?

A. No, sir, I didn't.

Mr. Wise: I object to that.
The Court: He may answer.

Mr. Ryan:

Q. Did you hear any movement of the cars coming in or call or warning of any kind?

Mr. Wise: I object.
The Court: He may answer.

A. No, sir.

Mr. Ryan:

Q. What time of the day did this crash occur?
A. Well, It was around about, I should judge, about five or ten minutes to seven.

Mr. Ryan: You may cross-examine.

[fol. 82] Cross-examination.

By Mr. Wise:

Q. Mr. Sharp, when you heard this crash, did you stop the truck?
A. No, sir.
Q. What called your attention to it? Was it the severity of it that called your attention?
A. Well, there was such a severe crash I just looked around and seen the cars moving east.
Q. The cars moved along, there was nothing else?
A. No, sir.
Q. You say when you came back for the third load this coal car was three or four cars east of where it had been?
A. Yes, sir.
Q. Now how long had you been loading and unloading coal and other material in that yard?
A. Out of that yard?
Q. Yes, how long had you been in that business with your father?
A. Well, we just started that morning on that car.
Q. No, I mean prior to that time, had you been engaged in the business for a long while?
A. No, sir.
Q. How many carloads of coal or other material have you unloaded from that yard?

A. Well, I don't know just how many, not very many.
Q. How long had you been engaged in the business with your father, how many months or weeks or years?
A. I started in in '24, in March, 1924.
Q. March, '24?
A. Yes, sir.
Q. That was about the time this accident happened, is that right?
A. No, sir.
[fol. 83] Q. That is two years before. Pardon me. Had you been engaged in the business all that time with your father?
A. Since I started.
Q. Since March, 1924?
A. Yes, sir.
Q. How many—had you unloaded coal cars around there then in a short time before you did this one?
A. No, sir.
Q. When did you say you were in the service of the C. & O. Railroad?
A. In about 1918.
Q. How long were you with them?
A. Well, I don't know. I expect about a year, but I don't know. I am not saying no definite time.
Q. What were you doing while you were employed? As a fireman?
A. Yes, sir.
Q. Running on the main line?
A. Yes, sir.
Q. Did you see Nick that morning when you were there?
A. No, sir.
Q. Didn't see him at all?
A. No, sir.
Mr. Wise: That is all.

Sam Cretas, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your name?
A. Sam Cretas.

Q. How do you spell the last?
A. C-r-e-t-a-s.
Q. Where do you live?
A. Peru. Peru, Indiana.

[fol. 84] Q. What is your business now?
A. Livestock delivery, livestock holder and delivery man.
Q. What do you mean by livestock holder? What do you mean?
A. Holding cattle.
Q. Sir?
A. Cattle.
Q. How long have you been in that business?
A. Oh, about two or three months.
Q. What did you do before that?
A. I used to work here in Chicago before that for a while, about two or three months.
Q. Did you ever work for the Chesapeake & Ohio Railroad?
A. Yes, sir.
Q. In Peru?
A. Yes, sir.
Q. Did you work for that road?
A. I worked there in 19— March I started there, first of March, 1926.
Q. And how long did you work there?
A. Two months.
Q. Do you know the plaintiff in this case, Nick Mihas?
A. Yes, sir.
Q. How long have you known Nick?
A. Oh, ever since I worked down there.
Q. Well, did you know him before you went to work for the railroad?
A. I know him to see him.
Q. Sir.
A. I know him to see him.
Q. That is you knew him to see him in Peru?
A. Yes, sir.
Q. By the way, Mr. Cretas, are you a Greek? That is, do you come from Greece?
A. Yes.
Q. How long have you been in this country?
A. Ten years.

Q. And you knew this man to see him?
A. Yes, sir.
Q. What kind of work did you do for the railroad when you worked for them, commencing, March 1, 1926?
[fol. 85] A. Section laborer.

Mr. Wise: What did he say?

Mr. Ryan: Q. As a laborer, is that what you said?
A. Section laborer, yes.
Q. Who was your foreman or boss?
A. FitzHarris.
Q. Well, did you work in the same gang that he worked in?
A. No, sir.
Q. What did you do, repair tracks?
A. Repair tracks, yes, sir.
Q. You did not take care of the lights or signals?
A. Oh, no.
Q. And where did you live when you worked for the Railroad Company?
A. Lived at 118 West Canal.
Q. You didn't live in the little house with Nick?
A. No, sir.
Q. Now calling your attention to the morning Nick got hurt, where were you at the time of his accident?
A. I was going to work.
Q. What was the name of your street?
A. Canal street. I was walking down Canal street.
Q. And the number?
A. Where I was staying you mean?
Q. No, the number of your house?
A. 118 West Canal.
Q. What?
A. 118 West Canal.
Q. Is that east or west of the house Nick lived in?
A. West.
Q. West of the house?
A. Yes, but I went up to the restaurant to get my lunch, my breakfast, see, the restaurant located at corner right by the depot there is a restaurant, right by the depot, right by the C. & O. depot.

Q. Then when you were going to work what direction were you going?

A. West.

Q. On what street?

A. Canal street.

[fol. 86] Q. All right. Now did you see Nick shortly after he got hurt?

A. After he got hurt I saw him.

Q. But you didn't see him before that morning?

A. No.

Q. Now where were you? By the way, as you were going west there were you walking on the sidewalk on the south or north side of Canal street?

A. The south side of Canal street.

Q. Is there a sidewalk on the south side of Canal?

A. There is a sidewalk on the south side of Canal.

Q. Canal street is north of the railroad?

A. Canal street is north of the railroad tracks.

Q. Now as you approached Nick's house, tell us what, if anything, you saw or heard.

A. I saw a wagon, truck, was unloading coal from a coal car.

Q. I didn't get you.

A. I saw a truck unloading coal from a coal car.

Q. Well, what did you see the truck do?

A. Just before I got there the truck was pulling out.

Q. And then what happened? What, if anything, did you see?

A. Right after the truck was pulling out there, I heard a crash.

Q. Then what did you do?

A. I see coal flying all over there.

Q. What?

A. Coal from coal cars was flying all over there. That is how hard the cars hit.

Mr. Ryan: Your Honor, might I have that answer read?

The Court: He said he saw coal——

[fol. 87] The Witness: Coal from coal car flying all over there.

The Court: He said that is how hard the cars hit.

The Witness: It is how hard the cars hit.

Mr. Ryan:

Q. Who, if any one, did you see after that?

A. I saw Nick after that. He was dragging his right shoulder like that (illustrating), walking into the house, and I know something happened to him.

Q. Wait a minute. After this crash——

A. After this crash.

Q. —Where was Nick when you first saw him after the crash?

A. I seen Nick was going to the house, right on the bottom step on the back end of the house.

Q. How far is that track, that number 3 team track there from the back of Nick's house, do you know?

A. Oh, I imagine around twenty-five feet.

Q. Now you say you heard a crash and saw cars move. What cars, if any, did you see on this team track as you approached there? What cars were on the team track as you came up there?

A. Oh, there was a string of cars in there.

Q. Which way did they extend from Nick's house?

A. They would extend quite a little from both ways, east and west.

Q. Where was this coal car rolled? This coal car was standing at the time you heard the crash, you said?

A. Right on the coal car, a little ways from the house.

Q. How fast was the cars moved, if at all, toward the east when the crash occurred?

A. Oh, about three carlengths.

Q. Did you run up to where Nick was?

A. Yes, I run up to him. He was right in the house. He [fol. 88] was sitting in the chair and his partner was nursing him, see? He was looking at his hand.

Q. Did you see his arm?

A. I seen him dragging his arm going into the house, see, and I know something happened there, and I just run down in there.

Q. Did you help him into the house or not?

A. No, nobody ever helped him into the house. He got into the house himself.

Q. Then what did you do?

A. His partner was nursing him.

Q. I don't care about that. Did you run down for the foreman or somebody else?

A. No, he was hollering his arm, his arm, and of course I run down to the tracks where the train, to the tracks.

Q. That is what I am getting at.

A. And I tried to get somebody from there to pull up some kind of ambulance.

Mr. Wise: I object to that.

The Court: That he went down to the tracks, that is competent.

The Witness: That is, if there is probably some engine or yard engine was standing around in front of the tool house.

Mr. Ryan:

Q. Well, was your purpose in doing down there to notify somebody that he was hurt?

A. Yes.

Q. Where do you say the engine was standing?

A. The engine was standing right about by the tool house. We had tool house where we was getting our tools all together in one shack.

Q. Where was the tool house with reference to the house that Nick lived in where the coal car was?

A. Oh, it was quite a distance around, four or five hun-
[fol. 89] dred feet.

Q. Four or five hundred feet which way?

A. West, west from his house.

Q. Do you know how far that team track extends toward the west from this little house there where Nick used to live?

A. I have an idea it extends around, let us see, around about three hundred feet, I suppose.

Q. What is that?

A. About three hundred feet. Of course I never measured it.

Q. Well, is the tool house beyond the switch leading from the main line to the lead track that connects with the team track?

A. Yes.

Q. It is beyond that?

A. Yes.

Q. That is just a guess on your part as to how far that is?

A. Just a guess on my part how far that is, yes.

Q. Well, did an ambulance come and get Nick?

A. No, the engine was standing there and I told somebody and them fellows, when I got there, they asked me if anybody got hurt.

Q. Well, I don't care about that.

A. I told him "A man up here got his arm cut off."

Q. Wait a minute. Did you see him taken away from there? Did you see him put into an ambulance or some sort of conveyance and taken away?

A. No. Yes, I got the engine, see, I got to the engine, the engine went down to the yard office. We called from down there, see? The ambulance come to the house and take Nick to the hospital.

[fol. 90] Q. What time in the morning was this?

A. About ten, fifteen to seven.

Q. Where did you report for work in the morning, if you reported anywhere?

A. To the tool house.

Q. And that is the distance west of this house?

A. Yes, west, west from Nick's house.

Q. Were you on Canal street at the time this crash occurred?

A. Yes.

Q. In reaching the tool house, did you have to cross this team track or not?

A. Not unless if you want to.

Q. That is, it was down beyond where it led on to the main track?

A. Yes.

Q. And you were not required in your work to cross these tracks?

Mr. Wise: I object, if the court please.

A. No.

The Court: It is immaterial.

Mr. Ryan:

Q. Were you familiar with the tracks there, with the tracks in the yard commencing with number 3 team track, extending east and west there?

A. What was that?

Q. Did you know about these tracks? Did you pass there, go by there most every morning?

A. Yes, I passed by there most every morning.

Q. Will you tell us what, if anything, was in this team track in the mornings, what was customarily on this team track?

Mr. Wise: I object.

A. Yes, there is always a bunch of cars in there.

Mr. Wise: The question is, this morning.

The Court: No, he may state.

[fol. 91] Mr. Ryan:

Q. I didn't hear your answer. What, if anything, was customarily on that team track in the morning around seven o'clock and shortly before? Did you understand my question?

A. I don't understand your question.

Q. Well, I think perhaps you answered it, but I didn't hear your answer. You know the team track, the first track south of Canal street.

A. Yes.

Q. Now, you say you passed there pretty near every morning going to work after you had your breakfast?

A. Yes.

Q. What was customarily on that track in the morning at that time? Do you know what "customarily" means?

A. Warning?

Q. Well, do you know what I am talking about? I don't want you to answer.

A. I don't know what you are talking about.

Q. Well, that is a pretty good reason for not answering. Was there anything on that track every morning when you went to work?

Mr. Wise: I object.

A. String of cars.

The Court: Of course, the plaintiff has not testified, but on the statement of counsel to the jury, that he was there habitually.

Mr. Ryan: I have alleged that, too, your Honor. I have alleged that in my declaration.

The Court: Go ahead.

Mr. Ryan:

Q. Was that track generally filled with standing cars there?

Mr. Wise: I object.

A. Yes, sir.

The Court: Yes, leading in form. The answer is stricken out.

[fol. 92] Mr. Ryan:

Q. When you say there were cars there on that track every morning, how many cars were there usually?

A. I never counted them, probably seven or eight or nine cars.

Q. Was there anything in back of that little house, I mean south of it, except the house itself? Was there a yard or shed or anything?

A. Nothing but a little coal shed there.

Q. Was that the only building on there west of the freight house? That was the only building on the railroad premises?

A. There was some more buildings down farther.

Q. Well, in between there and the tool house?

A. Between the freight house and tool house?

Q. Yes?

A. No.

Q. The only building is that little house Nick lived in?

A. That little house, yes.

Mr. Ryan: You may ask.

Cross-examination.

By Mr. Wise:

Q. How long did you work for the Railroad Company?

A. Two months.

Q. What?

A. Two months, around two months.

Q. You were with the company about two months?
A. Just about two months.
Q. You lived on Canal street, which was north of where Nick lived?
A. Yes.
Q. Was it east or west?
A. Where I stayed you mean?
Q. Where you stayed, yes.
A. West.
[fol. 93] Q. Where did you say you went to get your breakfast?
A. Palace restaurant right by the C. & O.
Q. Is that east of where Nick lived?
A. No, right by the C. & O.
Q. East of where Nick lived?
A. Right by the C. & O. depot, east of where Nick lived.
Q. How far?
A. About two squares.
Q. Where were you coming back from your breakfast that morning when you first noticed anything about this? Where were you with reference to Nick's house? Were you east of it?
A. East of it, yes.
Q. How far?
A. Well, I first heard the crash, you mean?
Q. Yes.
A. Oh, about one hundred feet, two hundred feet.
Q. How soon after that did you see Nick?
A. Right after he got hurt.
Q. What?
A. Right after he got hurt.
Q. How soon after you heard this crash? You were a couple of hundred feet away you said?
A. Yes. I seen him right away, right after.
Q. Did he go in the front door or back door?
A. No, he went in the back door.
Q. Back door?
A. Yes.
Q. Did you see him before you came up to his house?
A. I didn't see him before he came up to the house, no.
Q. Before you came up to even with his house?
A. No.

Q. And he was then coming in the back door?
A. Yes.
Q. Did you go to the hospital with him?
A. Yes.
Q. Did he say anything to you about the accident?
[fol. 94] A. No, he didn't.
Q. Did he tell you where he was going when he got hurt?
A. He was going to work.
Q. Did he tell you where he was going to go to work?
A. I didn't get that.
Q. Did he tell you where, what part of the yards he was going to? Did he tell you he was going to the tool house to go to work?
A. He told me he was going to work. All I know of, he was going to work.
Q. Did he tell you that he was going to the tool house?
A. He didn't tell me he was going no place.
Q. What is that?
A. He didn't tell me he was going to the tool house.
Q. He didn't tell you that?
A. All he tell me is going to work.
Q. Did you know where Nick's speeder was that morning?
A. I don't know.
Q. You didn't know.
A. No.

Mr. Wise: All right, that is all.
The Court: Call another.
Mr. Ryan: That is all. Nick take the witness stand.
Mr. Wise: Does he talk English very good?
Mr. Ryan: Yes, I think he can make himself understood.
Mr. Wise: I was just wondering whether you were going to have an interpreter.
Mr. Ryan: No, I think he can do very well.

[fol. 95] Nick Mihas, the plaintiff herein, called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your name?
A. Nick Mihas.

Q. Can't you talk louder than that, Nick?
A. Nick Mihas.
Q. M-i-h-a-s?
A. Yes, sir.
Q. You are the plaintiff in this case?
A. Yes, sir.
Q. How old a man are you? How old are you?
A. Thirty-one now.
Q. Thirty-one or thirty-four?
A. Thirty-one.
Q. Oh, I beg your pardon. How long have you been in this country?
A. Fifteen years.
Q. And where did you come from?
A. It will be fourteen years right now.
Q. What?
A. It will be fourteen years. 1913 I come, 1912, I come here.
Q. Where did you come from?
A. From Athens.
Q. That is in Greece, is it?
A. In Greece, yes.
Q. How long were you working for the Railroad Company at the time of your accident?
A. 1913.
Q. Did you go to work for the Railroad Company when you first came to this country?
A. Yes.
Q. Are you a citizen of the United States?
A. First papers.
Q. When did you take out your first papers?
[fol. 96] A. 1922.
Q. And you have not got your second papers yet?
A. No, I figure getting them 1926. This happened here, it stopped me.
Q. What did you do when you first went to work for the railroad company?
A. Started water boy.
Q. And did you always live in Peru?
A. No, all over.
Q. Well, when you worked for the Railroad Company first where did you live?
A. Peru. That is first job here I got.

Q. How long had you lived in Peru at the time of your accident?

A. Well, five years straight.

Q. Five years straight?

A. Yes.

Q. How long were you a water boy?

A. I don't remember now. Not very long. Maybe a year or two.

Q. Then what did you do after that?

A. I was going on the hand cars.

Q. What were you doing at the time of your accident?

A. Track work, inspectors.

Q. Were you what was called a section hand?

A. Why, yes.

Q. Just what kind of work did you do for the Railroad Company?

A. Well, I do a little of everything.

Q. Tell us. The jury don't know what you did.

A. I take care of the lights, switch lamps, and take care of the switch lights, and I got to go all over the tracks. Anything wrong, I report to the boss, he fix it.

Q. That is, fix the track?

A. Yes. I had to take care of switch stands, light them [fol. 97] up, take care of them, lights and everything.

Q. How long had you been doing that particular work?

A. Well, four years. 1921 I got this job, to 1926. That is five years.

Q. And when you got that last employment where did you live?

A. Peru, on the C. & O., on the C. & O. property.

Q. What?

A. On the C. & O. property.

Q. On the C. & O. property, is that what you said?

A. Yes.

Q. You lived in that little house there?

A. Yes, sir.

Q. Just south of Canal street?

A. Yes, sir.

Q. And west of the freight depot?

A. West from the freight depot, yes.

Q. How did you come to live in that house?

A. Because Mr. Durgen, he was in charge, he was put me in that house, so they having me repair the switches,

see, and call me night time and any time, call me two or three times in the night, pretty near any time they need, anyway.

Q. I don't understand everything you said, Nick.

Mr. Wise: I don't think that is material.

The Court: Yes, he said he was there because they would call him two or three times every night for repairs.

The Witness: For repairs.

Mr. Ryan:

Q. Let me ask you this question. Don't answer, wait for the objection. When you got this last job——

A. Yes.

Q. Were you required to live there in that house so that you would be subject to the call of the Railroad when they wanted you?

[fol. 98] A. Yes, sir.

Q. So that you were on duty all the time?

A. Yes.

Q. What wages were you getting?

A. What?

Q. What were your wages?

A. Three dollars and sixty cents a day.

Q. How many days a week did you work?

A. I work straight, all, Sundays and all, thirty days.

Q. What were your average monthly earnings?

A. Well, a hundred and twenty, a hundred and twenty-five a month.

Q. And you were given living quarters free by the Railroad?

A. Yes, sir.

Q. State whether or not did you work frequently at night, emergency work.

A. Well, they paid me overtime for night time.

Q. Well, you got paid overtime.

A. Night time, yes.

Q. I was asking you, though, did you get called often to go out after hours to do different things? Did that happen often or just once in a while?

A. No, pretty near every second night we had to get out. We had troubles all the time.

Q. And about what time in the morning did you customarily or usually go to work?

A. Why, I had no regular time. I had so much to do. Sometimes I would get out six o'clock, six o'clock, seven o'clock. Sometimes I went to work four o'clock, keep right along till three and two.

[fol. 99] Q. But if you went to work at seven o'clock about what time would you finish in the afternoon?

A. I finished three, two-thirty, three-thirty, and sometimes maybe I stay four o'clock.

Q. That is, you had how many lights, how many signal lights did you have to take care of?

A. Ninety-eight.

Q. Where were they located?

A. West and east.

Q. Were they along the main line of the defendant?

A. Along four and a half miles. I had lights four and a half miles out on the main line.

Q. Is the Chesapeake & Ohio a common carrier by railroad?

A. Yes, sir.

Mr. Wise: I object to that, if the court please.

Mr. Ryan: Well, that is a conclusion.

The Court: Yes, it is.

Mr. Ryan: You will admit that of record, won't you, Mr. Wise, that you are common carriers by railroad, or will I have to prove it by outside testimony?

Mr. Wise: Why, of course, we are a common carrier by railroad.

Mr. Ryan: Are you stipulating to that effect or not, that the Chesapeake & Ohio is a common carrier by railroad?

Mr. Wise: Yes, I will stipulate that. Certainly.

Mr. Ryan:

Q. What did you use in getting about to take care of these signalling devices and switches?

A. Oil, oil them up.

Q. Well, the oil did not get you around on the job, did it? How did you move about? How did you get from place to place to do your work?

A. Well, I had a little car. We had a little speed car. We had a little speeder car, three wheels.

[fol. 100] Q. What did you call that car?

A. Spe-der car.

Q. Speeder car?

A. Yes, sir.

Q. How did you operate it?

A. By the hand.

Q. Could you lift it and carry it and place it on the track?

A. Sure, that is for one man. You carry, lift him and put him on the track.

Q. You say three wheels?

A. Yes.

Q. Three wheels?

A. Yes.

Q. Where did the third wheel run?

A. Two one side and one the other side.

Q. Two on one side on the rails and one on the other side. I get you. I have seen a different kind. I have never seen those. And you pumped it by hand, did you?

A. Yes, sir.

Q. You pushed it, in other words, you gave it a push?

A. Yes, sir.

Q. Where did you keep that speeder when you were off it?

A. I kept it across the track.

Q. Which side?

A. On the south side of my house.

Q. What did you have, what kind of place did you have to keep it in on the south side?

A. Had a little shanty.

Q. I didn't get you. What did you keep it in?

A. A little shanty on the south side of the tracks.

Mr. Wise: A little shanty.

Mr. Ryan:

Q. Did you say shanty?

A. Yes.

Q. Was that an old box car?

A. Yes, box car, yes.

[fol. 101] Q. That is what you call a shanty?

A. Yes.

Q. And over what territory did your work extend? How far to the east and how far to the west on the main line of this defendant company did you operate?

A. That is four and a half miles west and five miles east.

Q. Who was your foreman or boss?

A. That is Mr. Fitzharris.

Q. Mr. what?

A. Fitzharris.

Q. Fitzharris?

A. Yes, sir.

Q. Did any other railroad man live in that little house with you?

A. Well, yes, his name, fellow name Chris.

Q. Chris?

A. Yes.

Q. What was his other name, do you know?

A. Chris Gust.

Q. Chris Gust?

A. Yes.

Q. Did he and you live in that house together there?

A. Lived there. He is still living there yet.

Q. Well, the Railroad Company did not furnish you any food or meals?

A. No.

Q. What did they furnish you beside living quarters, heat and light?

A. Coal and oil.

Q. That is, you burned oil there, did you?

A. Oil, yes.

Q. Nick, did you know that yard pretty well there? Did you know about the tracks and where they were located and all that? Did you know all about the tracks in that yard there?

A. Sure.

Q. Now what was the first track just north of Canal street on that property?

A. That is number 3 team track.

[fol. 102] Q. Do you know how far it was from the little house down to the west end of the freight house, the west

end now, the end closest to your house? How many feet would you say that was?

A. Well, I can't say that because I don't know. That is a little—you mean the freight house?

Q. That is what I mean, yes.

A. Well, maybe about five or six hundred foot.

Q. Now are you guessing at that?

A. I guess, I don't know.

Q. I don't want you to guess.

A. I can't answer the question.

Q. Don't you know after living there four or five years about how far it was from the end of the freight house up to the end of your little house there?

A. Oh, I thought you say the platform, you mean. You mean on the platform?

Q. No, no.

A. The freight house is——

Q. I am talking about the end of the house. The platform extends up close to your house, doesn't it?

A. Close to my house, yes.

Q. But it is not any five hundred feet from your house down to the end of the freight house, is it?

A. May be four, I can't say, I can't guess.

Q. Well, now, commencing with number 3 track, what is the next track south of that?

A. That is number 2.

Q. Do you call that team track or house track?

A. House track.

Q. How many team tracks did you have there?

A. Three.

Q. I said team tracks.

A. One.

Q. One team track?

A. Yes, sir.

Q. How many house tracks?

A. Two.

[fol. 103] Q. All right. Now number 2 house track is the second track from the north?

A. Yes, sir.

Q. Where does that track end going east? Where does it stop?

A. The number 2 is that?

Q. Yes, sir.

A. That is against the freight house.

Q. It does not run through beyond?

A. No, no.

Q. On which side of this platform does number 2 track extend?

A. That is on the north side.

Q. Can you tell me about how wide that loading platform is that extends west from the freight house?

A. No, I can't tell you exactly.

Q. Well, about how wide was it? Was it as wide as this room or not?

A. No, it is about twenty-five or thirty foot wide.

Q. Twenty-five or thirty foot wide. Then what was on the south side of that loading platform?

A. That is another track in there.

Q. That is what you call number 1 house track?

A. Number 1.

Q. How far do you say the west end of that loading platform is east of your house or how far was it at that time?

A. The end of the platform?

Q. Yes, I want you to understand my question.

A. Yes.

Q. How far east of the east side of your house was the west end of this loading platform?

A. About forty, fifty feet.

Q. Now on the morning of the accident what were you doing?

A. Well, I get out, it was ten minutes to seven, I get out ready to work.

[fol. 104] Q. What was on the team track when you left your house and started to go to work?

A. There was two men, two men that loaded coal. They had a truck next on the north side of the house. I was ready. I came to the cars going to get my car out. I had to cross the river.

Q. Where was your speeder that morning?

A. Across the tracks.

Q. Was it in this shanty or box car?

A. On the shanty, that box car. I had to cross all them cars to get my car going to work.

Q. What, if anything else, was there on the track besides the coal car?

A. Well, it was a string, there was a string of cars all along.

Q. How far did that string of cars extend toward the west?

A. The first time I come out my door I seen them one side, west, west and east. He was a string of cars. I never count them, how far they was. I see they was full of cars.

Q. I didn't quite get you. About how far west did that string extend from your house? About how far did they go?

A. Maybe four or five hundred foot, the cars.

Q. How far east did the string extend?

A. I can't say, maybe say three hundred foot, maybe so. It was a lot of cars in there, lot of cars, string of cars in there.

Q. Were they standing or moving?

A. They were standing.

Q. What, if anything, was there on number 2 house track?

A. I don't know, he was some cars in there, too.

Q. Do you know how many cars were on number 2 house track?

A. No.

[fol. 105] Q. Now what did you do? You say you saw a truck unloading coal. Tell us from then on what happened, what you did before you started to cross the track.

A. Well, I see the truck on the north side of the house. I thought it was safe, see. I look on one side, I look the other side for anything moving, anything around. I don't see nothing coming and I climb the car, and there was coal car there, and I climb over the coal car. As soon as I get the car and before I get the car, I was ready to get on the top of the car, see? and I heard hit the cars so hard, and it thrown me inside of the cars in there.

Q. Can you tell me just what your position was at the time the movement was made, at the time the cars moved?

A. I can't understand.

Q. Well, what were you doing? Were you crossing between the cars, or what do you mean by that? Explain just what you were doing?

A. I had to go get my car.

Q. You told us that. That is all right.

A. Yes.

Q. I want you to explain to the jury just how you were going through, how you intended to go through?

A. Well, I tell you, I look one side, I look the other side. There was string of cars along. I look for anything move. There was nothing move. I never heard anything. As soon as I get on car, why, they hit the cars, they say seven or eight or nine cars, I heard afterwards, there was nine cars he was dropped on that track, and he was hitting so hard he throwed me inside the cars.

Q. What was your position? Were you on the stirrup on the end of the car or passing between them or what?

[fol. 106] A. No, I had got on two step. On two step I was. I was ready to get on car. I was just going in between the cars.

Q. What cars were you passing between, the coal car and some other car?

A. I had my hand on coal car, see, and box car was on the side. As soon as I put my toes up why then he hits me then.

Q. What kind of a bump was it?

A. Oh, it was terrible. I will tell the truth.

Q. Were the cars moved suddenly and violently or not?

A. Oh, certainly the cars were moved.

Q. Did you get any notice or warning that they were going to move?

A. Nobody was around.

Q. What was your customary way to go to work in the morning?

A. Always I think somebody would be around there.

Q. Listen. You are not answering, Nick, what I asked you. I asked you, how did you go to work every morning?

A. Well, I was telling, six o'clock, six-thirty.

Q. I didn't ask you what time. I asked you, how did you get over? Did you always keep your speeder the same place?

A. Same place.

Q. All the time?

A. All the time.

Q. Did you never vary from that?

A. Oh, every time I leave speeder some other place.

Q. Where would you leave it if you did not leave it in the shanty?

A. I have it on the shanty, sometimes I leave it stand the freight house in there, maybe once a month, maybe I leave down tool house. Always I keep my car in there so I have it handy to go to work every morning.

Q. Now then, in the morning, take it for a year before the time you were hurt——

A. Yes.

Q. Where did you go the first thing you did when you got out of your house to go to work? What did you do? [fol. 107] A. You mean the day I got hurt?

Q. No, before you got hurt? Did you do the same thing you were doing this morning or not?

A. Sure, I get out and I had a few lamps around.

Q. No, no, you don't understand. What I want to get at is, let us forget the morning you got hurt. Take the month and the year before you got hurt.

A. Yes.

Q. Every morning did you have to cross those tracks to go over to this shanty or not?

A. Sure.

Q. What?

A. Sure, every day I had to go across these cars to get my car because that was my way.

Q. Now what was there on this team track in the morning every morning, whether there were cars standing on this team track or not?

A. Yes, all the time a lot of cars.

Q. Always that team track was filled with cars?

A. Sure.

Q. Or partly filled?

A. Well, sometimes maybe don't find many cars in there. Always was kept pretty full.

Q. Did you know what they used to do customarily before they switched or moved cars in there on that track?

A. Sure.

Q. What did they do?

A. Well, always I thought it was somebody come round to tell people in there, because a lot of people is working

there, and always he was brakeman, if he would come in and say, "Boys, look out there, we are going to drop cars in there."

Q. Was your foreman, Fitzharris, ever around there in the morning when you went to work?

[fol. 108] A. Sure, he was around same morning. He was passing there twenty minutes after six.

Q. On other mornings did your foreman know about your having to cross the track?

A. Sure, always.

Q. Did he ever tell you not to cross between the cars?

A. No, he never did.

Q. Suppose you went down to the east end of the string of cars on team track number 3—understand what I am asking you?

A. Yes.

Q. Suppose you went down to the east end and passed around the end. Then what would you have to do to get back to the shanty to your speeder?

A. Why, it was too far away. I had to pass on the main line again. I had to pass them tracks again. It was too far away to go around.

Q. Where was the shanty with relation to your house where you lived?

A. On the south side of my house.

Q. Was it right straight across?

A. Yes, right straight across.

Q. Now suppose you went down two or three hundred feet and passed around the cars, if you could pass around there.

A. Well, I passed them on the track, the other track was blocked.

Q. Then after you started south from there, what did you have to do to get to your speeder?

A. What do you mean? I don't understand.

Q. Well, suppose this—will you pardon me, Mr. Wise?

Mr. Wise: Yes.

Mr. Ryan:

Q. Suppose this table is your house where you lived, see?

[fol. 109] A. Yes.

Q. And across away over beyond five or six tracks is your shanty or box car where you kept your speeder. Suppose this railing is the team track now extending east and west?

A. Yes.

Q. Now some hundred feet down here—there is a difference of opinion how far that is, but whatever it is, the freight house is down to your left, to the east, isn't it?

A. Yes.

Q. And then from the freight house leading toward the west and over between number 1 and 2 house track is a loading platform extending down to 75 feet or so from your house, isn't there?

A. Yes.

Q. Now suppose you walked east down on the north side of team track number 3, walked down three or four hundred feet, and got around the end of the cars. What would be immediately south of you then if you did that?

A. Maybe switch some other tracks in there. Maybe they switch some car in there and they hit me just the same.

Q. Well, the loading platform would be there anyway, wouldn't it?

A. Well, a lot of tracks in there and platform. You can't pass on track anywhere.

Q. Well, if that loading platform extends from the west end of the freight house up to within 75 feet of your house——

A. Yes.

Q. If you walked down two or three hundred feet and then started south you would either run into the freight house or the loading platform, wouldn't you, or the track alongside of it?

A. It is on the side track.

Q. Well, do you know what I mean?

[fol. 110] A. There was a lot of cars in there. There was a lot of cars in there on that track. I can't go. I had to go around to cross around the freight house.

Q. And had to walk back?

A. And walk back to get my car.

Q. Walk over between number 2 and 3 and then cross over number 2 after you passed the west end of the platform?

A. Yes.

Q. Did you ever do that during the four years you worked there? Did you ever go away down and then come down between the cars and over the platform to get to your shanty?

A. No, sir. Always I was crossing there because I thought I was safe in there. All the yard brakeman and conductors come in and give warning, "Boys, look out there." That is all.

Q. How long before you started to cross that track did the truck pull out? How far did the truck get in your judgment when this thing happened?

A. He was just pull out. He was just left, that is all, just to pull out. Maybe half a minute, he was just turning. I was grabbing the car.

Q. Do you know how many cars they dropped in on that track from the west end?

A. I don't know. I heard there was nine cars.

Mr. Wise: I object.

Mr. Ryan: That may be stricken out.

The Court: Objection sustained.

Mr. Ryan:

Q. Do you know if you were pushed or dragged by this car when you were thrown down there?

A. No.

Q. Do you know if you were dragged by the wheels any distance or not?

A. No, I don't know.

Q. You don't know?

A. No.

[fol. 111] Q. Did you get over to your house, Nick, or did anybody help you?

A. Nobody helped me. I get up myself. I was on the cars. I get up myself.

Q. Whom did you first see after you got over toward your house?

A. The fellow stayed with me named Chris. Chris comes. Second was Sam.

Q. How?

A. The second one he was Sam, Sam Cretas.

Q. Oh, Cretas. That is the man that was here?

A. Yes.

Q. Did you see him there?

A. Yes.

Q. And do you remember that you were taken to the hospital?

A. Sure.

Q. How long were you in the hospital?

A. Thirty-seven days.

Q. When was your arm amputated? When was your arm amputated? When was your arm cut off?

A. Well, then. When you mean?

Q. Yes.

A. Same day.

Q. Well, some doctor, some surgeon cut your arm off?

A. Sure, doctor.

Q. Will you just pull down your coat a little and show the jury how much of a stump you have got there?

(Witness illustrating).

Mr. Ryan: Mr. Wise, can the record show that he has a stump——

The Witness: Look out.

Mr. Ryan: No, I won't hurt you. Well, he hasn't virtually any.

[fol. 112] The Witness: No.

Mr. Ryan: Mr. Wise, would you step up here a moment, please?

Mr. Wise: Yes.

Mr. Ryan: May we agree upon how much of the arm or shoulder is left?

Mr. Wise: I don't know that I can tell. There is some there.

Mr. Ryan: At the back of the shoulder, he does not seem to have anything there. Here the bone itself seems to extend out. Well, two inches?

Mr. Wise: Yes, that is all right.

Mr. Ryan: I don't like to call a doctor to describe it. That is all right.

Q. And that is your right arm that you had cut off in this accident?

A. Yes, sir.

Q. Have you done any work since the accident?

A. No.

Q. Have you any—How far did you get in school? Have you any English education?

A. No.

Q. Did you ever hold any clerical position of any kind?

A. No, I left home young boy. I never was to school.

Q. How did you feel the first week? How did your arm feel the first week in the hospital?

A. Hurt me.

Q. Well, did it hurt or not?

A. Hurt and pain.

A. Have any pain in it?

A. Fever.

Q. Did you have any infection in your arm? Do you know what infection is?

A. Yes.

Q. Well, tell us about it. What kept you in the hospital thirty-seven days? Why did you stay so long?

[fol. 113] A. He not heal up. He run. He not heal up.

Q. What did the doctors do for it from time to time while you were there?

A. Well, just clean him up once a day. That is all he will do.

Q. Then at the end of thirty-seven days you left the hospital, did you?

A. I left the hospital, yes.

Q. Was your arm completely healed when you left the hospital?

A. No, it wasn't.

Q. How often did you go back to the hospital?

A. Every second day.

Q. For how long a time did you do that?

A. Well, I keep about two or three weeks around.

Q. Then where did you go? Did you come to Chicago then?

A. Then I come to Chicago.

Q. Did you ever get any other treatment for your arm since that time?

A. Yes, I went to see my brother at Wisconsin and I went to the doctor two times.

Q. What happened to the stump up there?

A. It opened up again. It was run.

Q. You mean it was discharging pus?
A. Yes.
Q. Did the doctor scrape the bone?
A. Yes.
Q. How often did he treat you?
A. Well, I went three times every day.
Q. Then did the arm heal?
A. And he was telling me just come right along and follow. I have no money; I can't got.

Mr. Ryan: That may go out. That may be stricken.
The Court: Strike it out.

Mr. Ryan:

Q. Listen. After this doctor treated you two or three times, whatever it was, scraped the bone and took out the infection, your arm healed?
A. Well, it healed up.
Q. It is healed now, isn't it?
A. Yes.
[fol. 114] How long after the accident was it and after the last treatment by this doctor in Wisconsin was it that your arm healed up?
A. About three months.
Q. Now what is the condition of the stump there at this time as to whether it is painful or sensitive?
A. Now?
Q. Yes.
A. It hurts, that is all. Lots of times it hurts me. Still I can't sleep on this side either.
Q. Were you hurt any place else except your arm?
A. And my back.
Q. What happened to your back?
A. Well, I hurt it same time, same time as the accident.
Q. Do you know—what was it, a sprain or bruise, or what?
A. I don't know. I don't know. That hurts me and I can't lay down. I can't pick anything heavy.
Q. What did the doctors do for you in the hospital?
A. Well, I tell you, I have complained two or three times.
Q. What hospital were you taken to in Peru?
A. I don't know the name. That is railroad hospital Wabash and C. & O.

Q. Was it railroad doctors that took care of you?
A. Yes, sir.
Q. Did they take any X-ray pictures of your back?
A. They did once.
Q. How many X-rays did they take of your back?
A. I think once.
Q. And you don't know what the X-ray pictures show, do you?
A. No, they never showed me.
Q. Where do you have this pain in your back, whereabouts?
A. Right in the middle, right (indicating).
Q. You are indicating the small of your back?
A. Yes.
[fol. 115] Q. Did you ever have any serious accident or injury before this time?
A. No, sir.
Q. Was your arm and hand fully developed?
A. Yes, sir, they was.
Q. And normal. What was the date of your accident?
A. What?
Q. When did your accident happen?
A. 16th of March.
Q. What year?
A. 1926.
Q. Do you know about the switches leading from the main line on to the team track, Nick? Can you tell us about those switches?
A. Yes, I know.
Q. Now, Mr. Wise, you stop me if I haven't got this right. On the south is a side track, the most southerly track is a side track extending east and west?
A. Yes, sir.
Q. Sometimes used as a main line, is it not?
A. Yes, on the south side.
Q. Now then, going on north, the first track north of this side track is the main line track?
A. Yes.
Q. Now then, next to the main line is number 1 house track, then number 2, and then number 3 team track?
A. Yes, sir.
Q. You have described those?
A. Yes, sir.

Q. Were you ever given any printed rules of any kind by the Railroad Company?

A. No.

Q. Were you ever told by anybody in authority not to cross over to your work across these tracks and between standing cars?

Mr. Wise: I object to that.

The Court: Sustained.

A. There was——

Mr. Ryan:

Q. No, wait. Don't answer.

The Court: No. Was he told not to ? Sustained.

Mr. Ryan: Well, you can cross-examine.

The Court: I think we will take our recess.

Mr. Wise: I beg pardon?

The Court: I say, I think we could not finish tonight anyhow, with your cross-examination. It is a quarter after four.

Mr. Wise: I think I could in about fifteen minutes.

The Court: All right, go ahead.

Mr. Wise: If your Honor wishes me to, and we can get through with this.

The Court: You have how many more witnesses?

Mr. Ryan: I think I am through, your Honor. I might like to get a medical description of that stump so I will know definitely what the length of it is.

The Court: I think we will take a recess. Remember, [fol. 119] gentlemen, you are not to talk about this case nor permit any one to talk in your presence concerning it, and refrain so far as you can from forming your final judgment about the merits of the case until you have heard all the evidence, the arguments and the instructions. Come back on Wednesday morning.

Whereupon an adjournment was taken to Wednesday, April 6, 1927, at 10:00 o'clock A. M.

Wednesday, April 6, 1927—10:00 o'clock, A. M.

Court met pursuant to adjournment.
Counsel present as before.

The Court: Proceed, gentlemen, with the case on trial. Call your next witness. I believe the plaintiff was on the stand.

Mr. Ryan: Yes.

NICK MYHAS, the plaintiff herein, called as a witness in his own behalf, having been previously sworn, resumed the stand for further examination and testified as follows:

Direct examination (continued).

By Mr. Ryan:

Mr. Ryan: Just one question, your Honor. I guess there is no doubt about this, but I want to ask this question.

Q. The C. & O. runs from Chicago to Indiana, runs from Illinois to Indiana?

A. Yes, sir.

[fol. 120] Q. You have ridden on their passenger trains?

A. Yes, sir.

Mr. Ryan: That is all. You may cross examine.

Cross-examination.

By Mr. Wise:

Q. You started to work for the C. & O. Railroad Company in 1913, is that correct?

A. Yes, sir.

Q. The first employment you were water boy?

A. Yes, sir.

Q. When did you go to work steady in the Peru Yards?

A. 1920.

Q. 1920?

A. Yes, sir.

Q. What were you doing when you first went to work in the Peru Yards?

A. Worked on section first.

Q. On the section?

A. Yes, sir.
Q. Was Mr. Fitzharris your boss then?
A. No.
Q. Who was it?
A. A man named Brown.
Q. In 1921 you went to work tending the switch lights and track work, didn't you?
A. Yes, sir.
Q. Your work was up and down the tracks east and west of Peru?
A. Yes, sir.
Q. When did you first go to live in the little house alongside of the railroad there?
A. 1922.
Q. 1922?
A. Yes, sir.
Q. And you lived there continuously all the time?
A. All the time, yes, sir.
Q. Did someone live with you?
A. Yes, Gus.
[fol. 121] Q. Was he there all the time with you during the four years you lived there?
A. Yes, sir, at the same time.
Q. During those four years that you lived alongside of the tracks you were familiar with the switching operations in the yard, weren't you?
A. Yes, sir.
Q. They switched cars in and out of the different tracks, the team track and the house track continuously during that time, didn't they? They switched cars in there all the time every day, didn't they?
A. Every day, yes. Not all the times of day.
Q. Not all times of day, no, but every day they switched cars in and out of the team tracks and house tracks?
A. Every day, yes, sir.
Q. There was usually a train switching there in the morning between six and seven o'clock, wasn't there?
A. Well, yes.
Q. Every morning?
A. Every morning, yes.
Q. They brought cars from what they called the lower yards west of your house there?
A. Yes, sir.

Q. And put them in on the team track and the house track, didn't they?

A. Put them in.

Q. On the team track next to your house and the house tracks that were south of you?

A. Yes, they switched in there and they put them in the house track.

Q. They had those switching operations every day during the morning betwe-n six and seven o'clock?

A. They had, yes, sir.

[fol. 122] Q. You were familiar with the way they handled that switching, weren't you?

A. What?

Q. You saw them doing that every morning practically all the time, didn't you?

A. Yes, I seen them.

Q. You knew they were switching cars back and forth?

A. I know it.

Q. What?

A. Sure.

Q. Generally they would bring cars down to a crossover that was down near the freight house east of your place, wouldn't they?

A. What?

Q. To get them out of the lower yards to the west?

A. The crossover is away down to the tool house.

Q. Yes, the crossover was down near the freight house.

A. It used to be.

Q. It was at the time of this accident?

A. No.

Q. It was down near the freight house, wasn't it?

A. No, sir, it was on the west end of the yards.

Q. What is that?

A. On the west end.

Q. On March 16, 1926, when this accident happened——

A. Yes, sir.

Q. I don't want to get you confused. Wasn't the crossover from the south track to the main track where they switched cars over down near the freight house?

A. They had a crossover over on the west end.

Q. And they had one near the freight house. Did they have one at the east end, too?

A. They did have before, and they took it out.
Q. And they took it out?
A. Yes, sir.
Q. That was after the accident, wasn't it?
A. It was before the accident they took it out.
Q. Well, you knew they were switching cars around there every morning, didn't you?
[fol. 123] A. Every morning.
Q. You knew it was customary for them to switch cars on the different tracks every morning there was a switching crew in there?
A. Yes, somebody come in.
Q. I ask you if this is not so?
A. Yes, they were switching cars.
Q. This morning on the 16th of March, the morning you got hurt, what time did you get up?
A. I got up at 5:30.
Q. You got up at 5:30?
A. Yes, sir.
Q. What did you do after you got up? Got your breakfast, I suppose?
A. I got my breakfast and I went outside and I had some chickens in there and I fed my chickens.
Q. You fed your chickens?
A. Yes, sir.
Q. Then did you go back in the house?
A. I go back in the house again.
Q. How long did you stay in the house?
A. Well, I stayed there, it was ten minutes to seven.
Q. You stayed in the house until ten minutes to seven?
A. Yes, pretty close to seven.
Q. When you came out of the house, did you go directly across the cars?
A. Started right from my door.
Q. You went out of your door and went over to the cars to get over, didn't you?
A. I come out of the door and I looked to one side and I looked the other side, I never saw nobody and no train around.
Q. Now, just a minute. You didn't see anybody?
A. I didn't see anybody except two men that was loading coal.

Q. Where were those men?

[fol. 124] A. They were just across from my door on the east side.

Q. Were they moving the truck then, was it going?

A. Just leaving, just moving the truck.

Q. They had just left the car with the truck when you came out of your house?

A. Yes, sir, just moving.

Q. The truck was just moving away?

A. It was just the other side, the truck was moving.

Q. The truck was moving away from the car?

A. Yes, sir.

Q. Now, the men that were unloading were in the truck going away, were they?

A. They just started to go.

Q. Yes. So before you went to the car to get through the truck had left the car, had it?

Q. We went just at the same time the truck was going.

Q. Just at the time the truck moved away you went to get in between the cars?

A. Just at the same time I got in the car.

Q. The men had left the cars, they were in the truck, were they not?

A. Yes, in the truck.

Q. The truck was going directly east, was it?

A. Yes, sir.

Q. Did you say anything to the men or did they say anything to you?

A. Who, men?

Q. The men in the truck.

A. No, I don't know those people.

Q. You never saw them?

A. I seen them.

Q. You didn't talk to them?

A. No.

Q. They didn't say anything to you?

A. No.

Q. Now, I understand you, you came right out of your house, out of the kitchen door, was it?

A. Yes, sir.

Q. The back door?

A. In the back door.

[fol. 125] Q. And went right along to the cars to go through, did you?

A. Yes, sir.

Q. You passed through the cars to get through between the cars?

A. Yes, sir.

Q. Did you look when you left your back door that was about 25 feet from the north rail of the side track, was it, or team track?

A. Yes, sir.

Q. About 25 feet to the north?

A. Yes, sir.

Q. When you came out of your house did you look up the track to see if there was any trains up there?

A. I looked one side and the other, I didn't see no train, I didn't hear no noise, there was nobody around.

Q. Did you look to see if there was any train at the west end when you came out of your kitchen door?

A. I looked.

Q. You didn't see anything?

A. I didn't see anything.

Q. Could you have seen a train up there if there was one there?

A. I didn't see no engine or train.

Q. I said, could you, was there anything to obstruct your view?

A. You cannot see very well from the tool house because——

Q. You could see a train 400 or 500 feet away if it was up there, couldn't you, from your back door?

A. You can see three miles if you get a clear track, this is not clear.

Q. From the point where your kitchen door was when you came out, when you looked to the west, if there was a train up there on the main track coming into the lead, you could see it, couldn't you?

A. Coming from the west?

Q. Yes.

A. You cannot see it.

Q. At any time when you were out in the yards feeding [fol. 126] the chickens, or anything like that, could you see any train moving over in the yeard?

A. No.

Q. Over around the freight house?

A. If the track was clear.

Q. What?

A. If there was no cars in there.

Q. I asked you, did you notice any trains switching in there?

A. Not that morning.

Q. What is that?

A. No.

Q. Did you hear any engine or anything switching cars over on the main track or near the main track south of this team track where you looked?

A. No.

Q. How long was it after you fed the chickens before this accident happened, when you were out in the yard, how long was it before that—about what time was it?

A. It was around six o'clock.

Q. Around six o'clock?

A. Yes, sir.

Q. Then it was quite awhile before the accident happened?

A. Sure.

Q. You were in the house all the time after this, were you?

A. In the house, yes, sir.

Q. During the morning before that did you know they were switching down that yard and around that track at that time in the morning? You understand they were switching cars around those team tracks, didn't you?

A. Like they are, if there were no cars around, you could see.

Q. It was usual for them to be switching at that time, wasn't it?

A. What do you mean? I don't understand.

Q. Every day, every day or so, at that time in the morning they brought cars into those tracks?

A. Yes, you could see them because all the brakemen and conductors come in there.

[fol. 127] Q. They were putting cars away at that time in the morning in the team track, weren't they?

A. Every morning you mean?

Q. Yes. Every morning, that was the usual thing?

A. Yes, sir, always had some cars in there.

Q. Spotting the cars as they usually did so they could be unloaded at the team tracks and those places, is that right?

A. Yes, sir.

Q. Now, I understood you to say that you came out of your house, out of the back door and saw this truck moving away and then you went right on across and passed through the cars, is that right?

A. I looked all around.

Q. You looked all around?

A. I looked all around the first track myself to see if there was anything coming.

Q. You didn't see anything coming?

A. No, I didn't see anything coming.

Q. You wanted to go right through the cars at that time?

A. Yes, sir.

Q. And you say you could not see anything, if you looked up the tracks you could not see anything anyway?

A. If there was anything around there.

Q. You said your view was obstructed so you could not see anything, is that so?

A. You could see if there was anything around, because the track was clear.

Q. If the cars were coming, you could see them, couldn't you?

A. It was too far away.

Q. Then you could not see them?

A. You could not see them?

Q. All right. There was a tool house to the west of your little house, wasn't there, when the men generally got to-

[fol. 128] gether before they went to work in the morning?

A. A tool house?

Q. Yes.

A. Yes.

Q. Do you know how far that was west of your place?

A. About a block.

Q. A block?

A. Yes.

Q. Do you know how many feet that would be?

A. I could not say how many feet that would be, 400 feet, 600 feet.

Q. About 600 feet. You did report at the tool house sometimes?

A. No.

Q. You never went to the tool house?

A. Oh, some time if I had anything to do there. I never report; if I had anything to get there, any oil or tools, something like that, I had to go.

Q. You don't know how many cars there were standing on the side track or team track, this track No. 3?

A. No, I couldn't say how many cars there were, but a string of cars.

Q. There was a string of cars, that is the best you can say. You don't know how many cars there were east of the coal car you tried to get through?

A. I don't know, the track was pretty well full.

Q. You don't know how many there were west?

A. There was strings of cars west and east.

Q. There is a street crosses the tracks to the east of the freight house, isn't there, called Broadway?

A. A Street?

Q. A street that crosses the tracks called Broadway that lies east of the freight house, is that right?

A. Yes, sir, you got to go away up to town, it is two blocks.

Q. Two blocks. Broadway is two blocks from your house, isn't it?

A. Two blocks, yes.

[fol. 129] Q. And that street runs across the tracks to the river, doesn't it?

A. It runs to the depot.

Q. And it runs across all these tracks?

A. Across the tracks?

Q. Yes.

A. Sure.

Q. These switch tracks.

A. Yes.

Q. So if you wanted to pass across these switch tracks without crossing through the cars you could have gone to Broadway and crossed, couldn't you?

A. Gone to Broadway?

Q. Yes.

A. Go on the street, you mean?

Q. Yes, you could cross on the street.

A. It was not necessary for me to go——

Q. Wait a minute. I didn't ask whether it was necessary. Could you have done that?

A. Why, it would take quite a while to go.

Q. You could have walked up to Broadway on Canal Street, couldn't you?

A. It was not necessary to go up there.

Mr. Wise: I ask to have that stricken out.

The Court: He asked you could you have done it.

Mr. Wise: You could have walked up to Broadway on Canal Street, couldn't you, and crossed over these tracks without crossing between the cars?

A. Sure, I could.

Q. What?

A. Yes.

Q. You could have. Yes. You didn't have any regular time for going to work, did you?

A. No.

Q. You went to work all the way from half past five o'clock until seven o'clock in the morning?

A. Some mornings I went six o'clock.

[fol. 130] Q. Yes.

A. Some mornings six thirty.

Q. Yes.

A. Ten minutes or a little over.

Q. You would be likely to come out of your little house there to go to work at any time between six o'clock and seven o'clock in the morning?

A. Yes.

Q. Nobody would know what time you were coming out of the house, would they?

A. Nobody knows.

Q. Nobody knew about that, just when you would go to work, when you would come out of there to go on your way to work, is that so?

A. Nobody, no.

Q. Nobody, no.

A. Except my boss. If you come before, my boss would know it.

Q. He didn't know whether you would come out of there at six, six fifteen, half past six, or seven o'clock, would he?

A. Lots of times he would come and call me at four o'clock, I had to go.

Q. What I am trying to get at is this, you didn't have any particular time when you left your house to go to work?

A. No.

Q. You went anywhere from between five thirty and seven o'clock?

A. No, five thirty was pretty early for me to get out. It was six or seven o'clock.

Q. Six or seven o'clock?

A. Between six and seven o'clock.

Q. Any time?

A. Yes, sir.

Q. You were not called out to work by the foreman or anybody that morning you were hurt, were you?

A. No.

[fol. 131] Q. The foreman did not tell you to go to work at any time?

A. No.

Q. It was daylight, wasn't it?

A. Daylight, sure.

Q. You could see, there was no darkness that prevented you from seeing, was there?

A. Sure you could see, it was daylight.

Q. After you were injured you were taken to the hospital, the Chesapeake & Ohio Company's Hospital?

A. Yes, sir.

Q. At Peru, Indiana?

A. Yes, sir.

Q. You were treated there by the company's doctors, weren't you?

A. Yes, sir.

Q. You stayed there 37 days?
A. Yes, sir.
Q. You didn't pay anything for that, did you?
A. No.
Q. Did you stay in Peru after you left the hospital?
A. Well, I stayed there in Peru, I don't know, fifteen days or twenty days, something like that.
Q. You stayed in Peru fifteen or twenty days after you left the hospital?
A. Yes, sir.
Q. Did you go to the hospital for treatment?
A. Yes, sir.
Q. And they treated you as long as you came there?
A. What?
Q. The doctor treated you as long as you came there for treatment, didn't he?
A. Yes, sir.
Q. Without any expense to you?
A. Yes, sir.

Mr. Wise: That is all.

Redirect examination.

By Mr. Ryan:

Q. Mr. Myhas, you answered counsel that customarily or usually they switched cars around on these tracks?
A. Yes.
[fol. 132] Q. Did you ever see them switching cars on the team track when it was filled with cars?

Mr. Wise: I object to that, if the Court please. I don't think that is cross examination.
The Court: I think you may answer. Did you?

The Witness: Did I see the cars, you mean, Mr. Ryan?
Mr. Ryan: If the Court please, I can make it a little plainer, I asked him whether or not he saw them switching cars in the yards.
The Court: I know, but he has the right to examine on that.
Mr. Ryan: Did you understand the question?
The Witness: No.

Mr. Ryan:

Q. You answered counsel you saw them switching cars in and out of the tracks you have there. Did you see them doing that on the team track filled with cars or partly filled.

Mr. Wise: I object to that because he is assuming that the team track was filled with cars.

The Court: He asked if *there* was so.

The Witness: I seen them come in and I saw the conductor and the brakeman come in and they say, "Boys, look out, I am going to move the cars."

Mr. Wise: I object to that.

The Court: Strike it out.

Mr. Ryan: That is not what I asked you now.

Q. When you look west and you are going south, across these tracks, which way does that steam track curve in order to get over to the main track?

A. It comes from the south.

Q. It curves to the south?

A. Yes, sir, and comes from the east.

Q. Yes. If there are a number of cars on the team track west of your house, you could not see the main track, could [fol. 133] you, at the other end?

A. No.

Mr. Wise: I object to that.

The Court: You are leading, Mr. Ryan.

Mr. Ryan: I guess tht is leading, your Honor.

Q. Could see the team track at the west end where the lead is from the team track over to the main track, from your house?

A. You cannot see it because there is another track in the middle, and they had another coal car there.

Q. Now, getting back to my other question: What tracks did they usually switch cars in and out of between six o'clock and the time you got hurt?

A. Which tracks?

Q. Yes.

A. No. 2 and 1, that is the house tracks and the team track.

Q. And there are three tracks leading from the north to the south?

A. Yes, sir.

Q. That you cross going from north to south?

A. Yes, sir.

Q. How far is it in feet from your house down to this street that counsel asked you about, Broadway?

A. Two blocks.

Q. What have you in mind when you say a block, what distance have you in mind?

A. What?

Q. How many feet would that be?

A. I could not say how many feet, maybe eight or nine hundred feet.

Q. Now, the team track that we have been talking about curves across Canal Street, does it not?

A. Yes, curves into the Hall plant.

Q. What is the name of that plant?

A. Hall plant.

Q. You would have to cross that track to get to Broadway?

[fol. 134] A. To get to Broadway, yes, sir.

Q. Then you would have to go south across the tracks to the river and then walk back eight or nine hundred feet, wouldn't you?

Mr. Wise: I object to that, if your Honor please.

The Court: Yes, leading again.

Mr. Ryan: It is a matter of computation.

Q. How far do you say it is from your house to Broad? way?

A. I say two blocks.

Q. I know, but two blocks might mean anything.

A. It is maybe——

The Court: Just excuse me a moment.

Mr. Ryan: Wait until the Court comes back.

(Short intermission.)

The Court: You may resume, Mr. Ryan.

Mr. Ryan: I will ask you another question: Is Broadway east of the freight house?

A. It is east.

Q. It is east of the freight house?

A. Yes, sir.

Q. Your shanty where you kept your speed car was about opposite your little house, was it?

Mr. Wise: I object, leading.

The Court: That is leading, but it is about something you have no objection to. It is location.

Mr. Wise: I do not think counsel should put the words into the mouth of the witness.

Mr. Ryan: You put several in his mouth that he did not get.

The Court: Proceed.

Mr. Ryan:

Q. Which way is this shanty from your house, east or west?

A. It is south.

Q. Was it either east or west or about opposite?

A. More east.

Q. How far east of your house was it?

[fol. 135] A. About four feet, five or six feet, something like that.

Q. Then whatever the distance was down to Broadway you would have to walk back that same distance to get to your speeder, wouldn't you?

A. Between two tracks, sure.

A. Another thing: What time was this switching that he has talked about customarily done in the morning and what time is it finished?

A. Seven o'clock, and lots of time they come up at six and finish at seven and lots of time he come fifteen minutes after seven.

Q. I am talking about the general switching, wasn't the switching completed before seven o'clock?

Mr. Wise: I object to that.

The Court: Sustained.

Mr. Ryan: Do you know about that?

A. No.

Q. Were they switching cars there right up to seven o'clock, that is customarily?

Mr. Wise: I object to that.

The Court: Objection sustained.

The Witness: I don't know, I couldn't say.
Mr. Wise: I move to strike out the answer.
The Court: Sustained, strike it out.

Mr. Ryan:

Q. Did you see the boss that morning before you got hurt?
A. My boss?
Q. Yes.
A. Yes, sir.
Q. Where did you see him?
A. I saw twenty after six it was when he passed.
Q. That is, you saw him pass your house?
[fol. 136] A. Yes, pass my house.
Q. You were asked if anybody knew about your crossing these tracks: State whether or not your foreman knew you crossed these tracks.

Mr. Wise: I object to that.
The Court: Sustained.
The Witness: No——
The Court: No, never mind. Don't answer.

Mr. Ryan:

Q. Well, was the foreman ever there when you started to go across to your work?
A. Yes, sir, and waiting for me.

Mr. Wise: I object to that, and move to strike it out.
The Court: It is overruled.
Mr. Wise: Just a minute, because he said, "Was the foreman ever there?" We don't know where "there" was.
The Court: Objection overruled.
Mr. Wise: Exception.

To which ruling of the Court the defendant, by its counsel, there and then duly excepted.

Mr. Ryan: That is all.
The Court: Anything further?
Mr. Ryan: Do you want to ask him anything further?
Mr. Wise: No.
Mr. Ryan: That is all. Step down, please.

The plaintiff here rested his case.

Mr. Wise: I want to make a motion in chambers.

The Court: Just hand up your motion. In regard to the testimony?

Mr. Wise: Yes.

The Court: All right. Step into chambers.

[fol. 137] Colloquy Between Court and Counsel

Mr. Wise: I want to move first, if your Honor please, to strikt out the testimony of the witness William Sharp as to the custom of giving warning to people who are working on unloading cars that are setting on the team tracks, because no notice of that kind would be required so far as the plaintiff in this case is concerned, he being an employe, and the evidence showing he had no duties or work to perform in and about the cars in question.

The Court: That motion is overruled.

Mr. Wise: And I take an exception.

The Court: Yes, an exception to everything.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The Court: What is your next?

Mr. Wise: My next motion is to strike out the testimony of the witness Edward Sharp which reference to the same custom and for the same reason.

The Court: Same ruling.

Mr. Wise: And exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The Court: Anything further?

Mr. Wise: In connection with that matter I would like to say to the Court to further prove my objection that if there was any notice or warning required by the custom or practice to people unloading cars, that under the testimony in this case the plaintiff ought to have inquired from those men as to whether or not any notice had been given.

The Court: Aside from any liability to give notice, the testimony would be competent as tending to bear upon the question of his care or want to care, what was in his mind at the time. I think that is competent.

[fol. 138] Mr. Wise: Not unless he made inquiry. The notice may have been given, the warning may have been given to those two men who testified, that they were going to switch cars in the yards and if the plaintiff had asked them about it, he would have known of it. He could not know of it under the circumstances because he was in his house all the time, according to his own testimony, so there was no way of notifying him in any manner whatsoever because he was not there.

The Court: What is your next motion?

Mr. Wise: My next motion is to give an instruction to find the defendant not guilty because there is no evidence of negligence on the part of the railroad company at this time.

The Court: That will be overruled.

Mr. Wise: Exception.

MOTION FOR DIRECT VERDICT

And thereupon, at the close of all the evidence offered by and on behalf of the plaintiff, the defendant, by its counsel, presented to the court its motion in writing that the jury be directed to find the defendant not guilty, and with said motion presented to the court its instruction in writing to find the defendant not guilty, which motion and instruction are in words and figures as follows:

Now comes the defendant, by William G. Wise, its attorney, at the close of the plaintiff's evidence, and moves the court to exclude from the jury all the evidence offered and received on the part and behalf of said plaintiff, and to give to said jury the following instruction:

"The court instructs the jury to find the defendant not guilty."

Wm. G. Wise, Attorney for Defendant.

[fol. 139] The court instructs the jury to find the defendant not guilty.

Refused.

But the court overruled and denied said motion and refused to give said instruction to the jury and marked said

instruction "Refused," to which action and ruling of the court in so overruling and denying said motion and in refusing to give said instruction to the jury and in marking said instruction "Refused," the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, in order to maintain the allegations in its behalf, introduced the following evidence, to wit:

The Court: Proceed, gentlemen.

HENRY A. BERTRAM, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wise:

Q. What is your name?
A. Henry A. Bertram.

The Court: Where do you live?
The Witness: Peru, Indiana.

Mr. Wise:

Q. What is your position with the C. & O. Railroad?
A. Assistant Division Engineer.
Q. Did you have the same position at the time of this accident, March 16, 1926?
A. Yes, sir.
Q. How long have you been employed by the C. & O. Railroad Company?
A. Seventeen years.
Q. How long have you been located at Peru, Indiana?
[fol. 140] A. Seventeen years.
Q. Been there all the time?
A. Yes, sir.
Q. You have charge of the supervision of the yards and appurtenances at Peru, have you, have the railroad company?
A. Yes, sir.

Q. You have charge of the men that are employed?

A. Yes, sir.

Q. All the track men who are under the track foreman?

A. All the maintenance-of-way men, the track men.

Q. Yes. I show you a blue print of the situation of the tracks and freight houses and other things in the Chesapeake & Ohio yard at Peru, Indiana, in the vicinity where this accident happened, and I will ask you who prepared that plat and took a blue print from it?

A. I prepared the map and made the blue print.

Q. Yourself?

A. Yes, sir.

Q. And that shows correctly the situation of the tracks, houses and distances in that place?

A. Yes, sir, it does.

Mr. Wise: I offer this in evidence.

Mr. Ryan: Mr. Wise, is that the situation that existed at that time?

Mr. Wise: I will ask.

Q. When was this made?

A. In March, 1926.

Mr. Wise: Now, is there any objection?

Mr. Ryan: I would like to have the witness state the exact date he made the measurements and drawing in order to make sure there were no changes in the tracks or switches.

[fol. 142] Mr. Wise:

Q. When was it that you made this plat?

A. In March.

Q. I think there is a date on there. You can refresh your recollection from that.

A. March 19, 1926.

Q. That was three days after the accident?

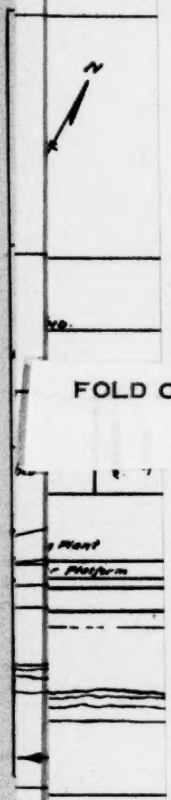
A. Yes, sir.

Q. Was the situation just the same at the time you made this drawing and blue print as it was on the 16th of March, the day that this accident happened?

A. Yes, sir.

Q. Were the track and building and switches all the same at that time?

A. They were.



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Mr. Wise: Is that satisfactory?

Mr. Ryan: I have no objection to the blue print.

Mr. Wise: I offer that in evidence as Defendants' Exhibit 1.

(Whereupon document referred to by counsel and identified by the witness was received in evidence and marked as Defendants' Exhibit 1.)

(Here follows exhibit, marked side folio page 141)

Mr. Wise:

Q. Now, calling your attention to this plat, Defendant's Exhibit 1, I will ask you to just state what the tracks are and what their locations are with reference to Canal Street, whether they are south of Canal Street—just give the numbers of the tracks and state their location.

A. They are south of Canal Street, and north of the Wabash River. The first track north of the Wabash River is the switching lead, then the main tracks, and then house track No. 1, house track No. 2, and the team track.

Q. Which is No. 3,—is it?

A. No, 3, yes.

Q. How does that team track stand with reference to the house where the plaintiff lived?

A. It is about 25 feet south of his house.

Q. That is the north rail?

A. The north rail, yes.

Q. Now, so as to avoid any confusion, this plat shows each track with a single line, does it?

A. It does.

[fol. 143] Q. Just so we understand it—there are not two rails shown on this plat, but each line represents a track with two rails?

A. Yes, sir.

Q. Now, can you tell how far or what distance there is on the team track No. 3 between Nick's house, between the house where Nick lived, and the switch which is west of there?

A. Yes, sir.

Q. Will you look at the plat and tell us?
A. You mean the switch point, Mr. Wise?
Q. The clearance point where cars would be.
A. 140 feet.
Q. 140 feet?
A. Yes, sir.
Q. How long is a car usually, an ordinary freight car, how long is it in feet?
A. 45 feet from end of coupler to end of coupler.
Q. Do you know what the custom and usual practice of switching cars in that yard was at the time, March 16, 1926?
A. Yes, sir.
Q. Do you know about the operation of the trains or the crew that did the switching at that time, along about that time, March 16, 1926?
A. Yes, sir.
Q. How are the switching operations conducted?

Mr. Ryan: That is incompetent and too general.
The Court: How they were before that time?
Mr. Wise: Generally how the switching operations were conducted at that time, around that time?
Mr. Ryan: Now, if your Honor please, I object to that.
The Court: What is the objection?
Mr. Ryan: How it was generally done would depend upon the location of the cars and a great many things not assumed in the question.
The Court: He may answer. Go ahead.
[fol. 144] The Witness: The switching crew brought the cars that would go to the house and team track from the main yard, they bring them out on the switching lead, cross over on to the main track near the east end of the freight house, and then take the cars westwardly, and enter into the team and house tracks.

Mr. Wise:

Q. What was the purpose of the switching of cars in on these several tracks, the team track and the house track?
A. In order that they might have them there by the time that the men at the freight house went to work, about the time that the trucks and teams came to the team track.

Mr. Ryan: May I have that answer read?
The Court: Read it.
(Last answer read.)

Mr. Wise:

Q. In other words, they were placed on these tracks for the purpose of unloading, were they not?
A. Yes, sir.
Q. I call your attention to plat, this Exhibit No. 1, and ask you to state where the crossover was, from the main track to the southernmost switching track, that is the track next to the Wabash River. State where that was at the time that plat was drawn and at the time this accident happened.
A. It was directly south of the intersection of Cass and Canal Streets.
Q. Was that east of the point where Nick's house was?
A. It is east.
Q. And south?
A. And south, yes, sir.
Q. How far east, about?
A. The west switch in that crossover is just south from Nick's house.
Q. So that trains using that crossover would have to pass to the point where Nick's house was located?
A. Yes, they would.
[fol. 145] Q. In order to get back on the main line?
A. Yes, sir.
Q. Calling your attention to team track No. 3, that is the track that was next to this house where Nick lived, where was the place for unloading cars, where was the usual and customary place for unloading cars?
A. It was east of Cass Stret, which is approximately 100 feet east of Nick's house.
Q. Yes. Was it the practice permitted by the company to set cars for unloading west of Nick's house?

Mr. Ryan: That is objected to, if your Honor please, "permitted by the company." I have no objection to the balance of the questions.
The Court: I think he may answer that. Go ahead.

The Witness: The cars were to be set east of Cass Street.
Mr. Wise: The cars for unloading on that team track No. 3 were to be set east of Cass Street?

A. Yes, sir.

Q. And when was that usually done?

A. That was generally before seven o'clock in the morning.

Q. Were people that had business to unload cars allowed to unload cars west of Nick's house on that team track?

A. No, sir.

Q. Were they supposed or allowed to unload cars before they had been placed for unloading by the switching operations that were conducted before seven o'clock in the morning?

A. No, sir, they were not.

Mr. Ryan: That is not competent and I object to that. The proof is they were unloading the cars west of Cass Street. How would it affect the situation here to have some rule about it?

Mr. Wise: It is very material.

[fol. 146] The Court: It may stand. The evidence may stand. You may argue the effect of it.

Mr. Wise:

Q. This switching operation that was conducted there in the morning, did that include the house tracks also?

A. It did.

Q. What was done with reference to the house tracks?

A. They started the cars at the sheltered platform opposite the doors in the freight house.

Q. And that switching operation was for the purpose of placing the cars in position on all three of those tracks for unloading?

A. It was.

Q. And that was to be done before seven o'clock in the morning?

A. Yes, sir.

Q. How far east from Nick's house to the sheltered platform, about how many feet was it?

A. About sixty feet.

Q. Sixty feet?

A. Yes, sir.

Q. The west end of that platform is about 60 feet east of where Nick's house is?

A. Measuring from the house diagonally across to the end of the platform would be about 85 feet.

Q. 85 feet.

A. But measuring on a line due south from his house at right angles would be about 60 feet.

Q. There is a little shed there, isn't there, just south of the house where Nick lived.

A. Yes, sir.

Q. How much space is there between that and the north rail of the team track No. 3?

A. Eleven feet.

Q. How much of a hangover is there on a car that is standing on the track?

A. How much does it extend beyond the rail?

Q. Yes.

A. About two and one-half feet.

[fol. 147] Q. Two and one-half feet?

A. Yes, sir.

Q. How far is the tool house from Nick's house?

A. 898 feet.

Q. How much?

A. 898 feet.

Q. That is west of his house?

A. Yes, sir.

Q. It is at about that point where the switching from the main track to these house tracks begins, isn't it?

A. Yes, sir.

Q. Where the switch is that lead into the three side tracks?

A. Yes, sir. The switch is just immediately east of the tool house.

Q. East or west?

A. Just west of it.

Q. West of it?

A. Yes, sir.

Q. And that is about 898 feet, you said?

A. Yes, sir.

Q. This plaintiff was employed as a section hand, was he?

A. He was.

Q. To whom did he report for his instructions?

A. To the yard section foreman.

Q. Who was that?

A. Mr. Arthur Fitzharris.
Q. Arthur Fitzharris?
A. Yes, sir.
Q. Does Mr. Fitzharris report to you?
A. He does.
Q. Do you know whether there is any custom or practice sanctioned by the railroad company of any men working in the yards passing through cars or going between cars?
A. It is strictly against the rules.
Q. Strictly against the rules?
A. Yes, sir.

Mr. Ryan: I move to strike that out.
The Court: Sustained. It is stricken out.

Mr. Wise:

Q. What is the custom about that?

Mr. Ryan: I object to assuming there is a custom.
[fol. 148] The Court: Is there a custom? He may answer. Is there a custom about it?
The Witness: The custom of crossing tracks is to walk around cars to be sure first they are not moving cars on that track.
Mr. Ryan: I object to that and move to strike out the answer.
The Court: Read the answer.

(Answer read.)

The Court: Sustained.

Mr. Wise:

Q. Do you give instructions to those under you to the effect that the employes must not pass between cars?

Mr. Ryan: This is objected to, if your Honor please.
The Court: Did you give any instructions to this plaintiff?
Mr. Wise: Yes, I will come to that. He is the superior officer here, and I am asking him what the instructions are to men working in the sections.
The Court: That would be immaterial unless this plaintiff knew of that. If there are printed rules, it is com-

petent to produce the rule and have it in evidence. If it was an instruction, a mere verbal instruction, then if this plaintiff did not know of it, that would be incompetent.

Mr. Wise: I want to show by this witness it is the practice and custom from his office to give instructions to all the foremen under him to instruct the men they are not to pass through cars.

Mr. Ryan: I object to that.

Mr. Wise: That is the rule of the company promulgated from his office.

The Court: Objection sustained on that.

Mr. Wise: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

[fol. 149] Mr. Wise:

Q. How many miles up and down the track did this plaintiff cover in his employment tending to switches and lights?

A. About three miles.

Q. Altogether?

A. That is three miles of main lines, yes, sir.

Q. That is the ordinary beat for a man doing this kind of work along the tracks, is it?

A. It is.

Q. Sometimes more, sometimes less?

A. Sometimes more and sometimes less, yes, sir.

Q. Do you know what salary this plaintiff received?

A. He received——

Mr. Ryan: Do you know, first?

Mr. Wise:

Q. Do you know?

A. Yes.

Q. How much?

A. 38¼ cents an hour.

Q. Do you know how much a day that would be?

A. $3.06.

Q. He worked Sundays, too, I suppose?

A. Yes, sir.

Mr. Wise: All right, you may cross-examine.

Cross-examination.

By Mr. Ryan:

Q. Mr. Bertram, how do you spell your name?
A. B-e-r-t-r-a-m.
Q. What is your title for the road?
A. Assistant Division Engineer.
Q. The section men and the repair men and the instructors have a boss in the yards, do they not?
A. Yes, sir.
Q. Is this Fitzharris their boss?
A. Yes, sir.
Q. You are his immediate superior?
A. His next immediate superior was the Supervisor of Track.
Q. What is his name?
A. S. Ryan.
[fol. 150] Q. The yardmaster has nothing to do with these section men?
A. They do in some matters.
Q. Insofar as the conduct of the yard is concerned, they have the right to control that, but they do not look after their working hours or direct them what to do, do they?
A. Only in cases of emergency.
Q. I understand that. Where is your office located, Mr. Bertram?
A. Peru, Indiana.
Q. Is it anywhere near the place in question?
A. It is about four squares, four city squares.
Q. What time do you generally get to your place of employment?
A. Well, from seven o'clock on, I have no regular hours.
Q. You don't get around there before seven o'clock very much, do you?
A. I go to the office, I report there between seven and eight o'clock.
Q. I understand. Your office is several blocks removed from where this accident occurred?
A. Yes, sir.
Q. Your duties do not require you to go up to that part of the premises?
A. They do often, yes.

Q. Not at that time of morning?

A. Some days it does. I am out on the road as much as I am in the office, or more.

Q. Did you personally make a survey of this yard?

A. Yes, sir.

Q. You did that yourself?

A. Yes, sir.

Q. Who aided you in making the survey?

A. Don Teel.

Q. He was the man who held the end of the tape measure?

A. Yes, sir.

Q. You actually made them according to scale, I take it?

[fol. 151] A. Yes, sir.

Q. You only have one line indicated for a railroad track?

A. Yes, sir.

Q. That is misleading in itself, is it not?

Mr. Wise: I object to that, if the Court please.

The Court: Sustained.

Mr. Ryan:

Q. How do you show relative distances with one straight line for a railroad track when every railroad track has a gauge of 4 feet, 8½ inches?

Mr. Wise: I object to that, that is not material. This plat is in evidence.

Mr. Ryan: It is very material.

The Court: I think he may answer.

The Witness: We show one line which would indicate the center line.

Mr. Ryan:

Q. Then the only measurements the jury could get from this plat if they wanted to know the distance between any given point beyond the distance beyond tracks would be to measure from center line to center line?

A. Yes, that is the practice in all railroad offices.

Q. Then you would have to know the width of the track in feet to know how far the tracks were apart?

A. We show it.

Q. You do?

A. Yes, sir.

Q. Is there anything on there to indicate the *guage* of a railroad track?

A. No, sir.

Q. You said your lines indicate the center line of the tracks, that is the center of the space between two rails of a track?

A. Yes, sir.

Q. All right. You have here, to illustrate what I am talking about, you have here the team track opposite Cass Street. You have one line, that is the center line of that team track?

[fol. 152] A. Yes, sir.

Q. If you measured directly south to the next line you come to the center line of No. 2 house track, is that correct?

A. That is correct.

Q. How far are these tracks apart? How far are the two innermost rails of these tracks apart?

A. I can scale it. It would be about 14½ feet, center to center.

Q. How far are the tracks apart? Suppose one wanted to know how much space there was between two tracks, would you tell us?

A. About 10 feet.

Q. And you say it is 14 feet from center to center?

A. Yes, sir.

Q. How do you figure 10 feet on that?

A. It would be 4 feet 8½ inches off of 10 feet.

Q. It would be 4 feet 8½ inches once or twice?

A. Once.

Q. What is the distance between your rails, it is a little over eight feet?

A. Approximately nine feet, yes, sir.

Q. You have this marked only C Team Track?

A. The next is "C. L.," that is center line. The numbers start with 1 next to the main line.

Q. Mr. Bertram, how far is it from the west line of this house that Nick lived in to the switch point leading to the main track from the team track?

A. I would have to scale it. Measuring down this track?

Q. Let us see. Here is your switch point, isn't it? (In-

dicating on plat.) I don't wish to go back to the main line, I am talking about the switch that they place cars from the main line on to the team track, going to the west switching point and measuring down to the east side of Nick's house, that is from this point here to here, is it not (indicating)?

A. This is the main line here (indicating). This is the [fol. 153] center line of the main track (indicating).

Q. I see. In other words, the switch from the main line leads on to the house track, does it not?

A. Yes, sir.

Q. And then you go a considerable distance east and then to the switch from the house track on to the team track?

A. Yes, sir.

Q. And then you go a little further on and you have another switch leading on to the—I wish you had these house tracks numbered there so we could talk about them intelligently.

Mr. Wise: They are 1, 2 and 3, they have been testified to that way all the time. The one nearest the house is 3. The north track is Team Track 3, is that right?

The Witness: Yes.

Mr. Ryan:

Q. And the next track is House Track — what is the number of that?

A. 2.

Q. No. 2 House Track?

A. Yes, sir.

Q. That is the one that extends along on the north side of the loading platform?

A. Yes, sir.

Q. All right. And the one south of that is No. 1?

A. Yes, we start from one next to the main line.

Q. All right. So that the jury and everybody may understand it from your main line extending east and west is a switch running on to the house track?

A. Yes, sir.

Q. And then after you go east a considerable distance you reach a switch that leads on to the team track, do you not?

A. Yes, sir.

Q. Now, then, from this switch point on to the team track down to the east side of Nick's house is how far?

A. You want along the track?

Q. Well, you can measure it along the track.

A. Precisely 270 feet.

Q. 270 feet?

A. Yes, sir.

[fol. 154] Q. How far is the most northerly rail of the team track north of the north rail of the House Track No. 1?

A. At what point?

Q. At the point where, at the point where it reaches Nick's house it is straight there, is it not?

A. Yes, approximately straight.

Q. Well, how much further north is the north rail of the team track than the rail of the house track at the switch?

A. It would be the same way because it is parallel, you see (indicating), approximately 34 feet.

Q. Is this a scale of 50 feet to an inch?

A. Yes, sir.

Q. Pardon me, I am not doubting you on that, but will you put your rule down and measure that again.

A. From the house?

Q. Come right up even.

A. About three (indicating)?

Q. Yes.

A. That is about 63 feet 9 inches.

Q. In other words, in a space of 270 feet you have a curve that extends around to the north about 60 feet, haven't you?

A. Yes, sir.

Q. Or approximately 60 feet?

A. Yes, sir.

Q. Just one further thing, Mr. Bertram: Is this loading platform that extends down between No. 1 and No. 2 House Tracks, has that a shelter, is there a shelter over that all the way along?

A. A roof over it, yes, sir.

Q. That is what I mean. And the platform, however, slopes gradually from the freight house or at some portion of it down to the surface of the tracks, does it not?

A. About 18 feet on the western end.

Q. I see, it slopes.

A. Yes, sir.

Q. And the platform is how far above the surface of the ground?

A. Four feet.

[fol. 155] Q. And then you have a shelter over it?

A. Yes, sir.

Q. How wide is the platform?

A. Nine feet wide.

Q. And you unload and load on both sides of the platform?

A. Yes, sir.

Q. And the west end of the platform is about 60 feet from the east side of Nick's house, is it?

A. That is measuring straight over this way (indicating).

Q. That is, if you drew a straight line south along the east side of his house, it would be 60 feet?

A. Yes, sir.

Q. And it does extend to Cass Street, the next street east of Nick's house?

A. Yes, sir.

Q. And Nick's house is on the railroad premises, Mr. Bertram?

A. Yes, sir.

Q. At the time of this accident wasn't the switch from the main track on to No. 1 House Track east of the tool house?

A. No, sir, it was west.

Q. Hasn't that one thing been changed since then?

A. It has.

Q. When was it changed?

A. That was changed early this last winter.

Q. Which way was the switch placed with reference to where it had been?

A. It has been moved approximately 500 feet east.

Q. That is, the switch at this time is 500 feet east of where it was on March 16, 1926?

A. Yes, sir.

Q. The switch at the time of the accident to Nick would be how far from Nick's house?

A. Approximately 900 feet.

Q. And what is the distance between the switch point leading from the main track on to the first house track to the switch point leading on to the team track? This plat [fol. 156] shows the switch as it was then, does it not?

A. Yes, sir.

Q. What is the distance?

A. 785 feet.

Q. 785 feet?

A. Yes, sir.

Q. Then what is the distance from the switch leading on to the team track—from the switch point—to the next switch leading on to the house track extending along the north side of the platform?

A. 105 feet.

Q. 105 feet?

A. Yes, sir.

Q. What is the distance from that point down to the switch leading from the main track on to the house track extending east and west on the south side of the sheltered platform?

A. From the west switch of the crossover?

Q. That runs from the main over, does it not?

A. It runs from the switch lead to the main, yes.

Q. It runs across the main track, does it not?

A. Over to the main.

Q. In other words, it runs from the switch lead, that is the main southerly track, over on to the first house track, doesn't it?

A. Yes, sir.

Q. What I wanted to get at is the distance between the switch point leads beyond the house track, on the north side of the freight house to that switch point?

A. 140 feet.

Q. Then these yards next to the south—of course you have your team tracks first, then your house tracks on the north side of the loading platform, then the house track on the south side, and then your main track and then this switch lead on the south, that is correct, isn't it?

A. Yes, that is correct.

Q. This crossover that you told counsel about where switching was done, was done by means of a crossover

from the lead track over on to the house track, was it not?
[fol. 157] A. From the lead track to the main track.
Q. Yes. Can you get from the main track on to the house track?
A. Only by going west on the main track, then to the west switch and house track.
Q. So this is the only crossover you had from the south switching track?
A. Yes, sir.
Q. That is the only crossover?
A. Yes, sir.
Q. You would have to first get on the main track and then go back west and then go through the same operation?
A. Yes, sir.
Q. And in making that operation the first track you would come to after you got on to this track here, the first switch you come to is the switch on to the team track?
A. That would be House Track No. 1, extension of House Track No. 1.
Q. And the track you call House Track No. 1 is away up here at Canal Street, isn't it?
A. No, sir.
Q. House Track No. 1 up here does not mean anything, does it, there is no unloading and loading up here to the west?
A. It is known as No. 1.
Q. But when you get on No. 1 and you want to get your train over down onto the team track, or either one of those house tracks, you would have to come down here a block?
A. Yes, sir.
Q. And the point I make is, coming down straight, east you reach the switch lead on the main track first, don't you?
A. Yes, sir.
Q. And the point I make is, coming down straight east you reach the switch lead on to the main track first, don't you?
A. Yes, sir.
Q. And the next switch leads to your house track?
A. Yes, sir.
Q. And the next switch leads into what?
A. That is all there are.
Q. There are two tracks?
A. Yes, sir.

Q. How do you get on to the other house track?

A. On the same switch. You close it there for No. 1 and open it for No. 2.

[fol. 158] Q. In other words, you have one switch that takes cars on to both house tracks?

A. Yes, sir.

Q. If you open it it puts you on the track on the north side of the freight house?

A. Yes, sir.

Q. If you close it it goes to the house track on the south side?

A. Yes, sir.

Q. When you answered your counsel there was only room for three cars in there on this lead between the first house track, you are assuming a car 45 feet long, are you?

A. Yes, sir.

Q. A freight car is not 45 feet long, is it?

A. Quite a few are.

Q. Aren't they customarily or mostly 35 foot cars?

Mr. Wise: I object to that.

The Court: He may answer.

Mr. Wise: He testified that the cars with the bumpers are 45 feet.

Mr. Ryan:

Q. A freight car is very seldom more than 36 or 40 feet long?

A. They run different lengths.

Q. But the average freight car is 36 or 40 feet long, isn't it?

A. No, sir, we figure 45 feet for all cars. We figure the capacity of the track is so much for cars of 45 feet length, because most of them are that length.

Q. Mr. Bertram, isn't it a fact that the average box car is 40 feet long? I am not talking about the couplers now, just the cars themselves.

A. That depends upon the kind of car it is.

Q. Isn't it a fact that 90 per cent of the box cars on all railroads are 40 foot cars?

A. I can't answer that question.

Q You are a railroad man——

The Court: Just ask the question.

Mr. Ryan:

Q. Isn't it a fact that about 60 per cent of the gondola cars are 36 feet from end to end?

[fol. 159] A. I don't know.

Q. You have the space where the cars are coupled together that is occupied by the coupler?

A. Yes, sir.

Q. What do you figure the ends of the cars coupled together, what do you figure that length?

A. 45.

Q. What is the distance between the ends of the two cars coupled together—if my glasses and pencil are two cars and they are coupled together,—what is the distance between the ends?

A. Between the ends?

Q. Yes.

A. I don't know positively, but they run about 4½ feet from one end of the car to the other, that is with the two ends together.

Q. So if you stood two cars up coupled together and they were 40 foot cars, the distance from the extreme east end to the extreme west end would be 88 feet and 4 inches, wouldn't it?

A. That measurement.

Q. Yes. If they were 36 foot cars they would be 72 feet plues 4 feet 4 inches, wouldn't they?

A. Yes, sir.

Q. Cars are customarily and very often placed on the team track and they extend along to the west on to this No. 1 house track, do they not?

A. Only while they are switching.

Q. How many cars does this team track hold, Mr. Bertram?

A. They get about nine cars on there, nine or ten cars.

Q. You mean team track No. 3?

A. That is, spotted for unloading?

Q. I didn't ask you except about how many cars it held.

A. I misunderstood.

Q. What is the capacity of that track for unloading purposes?

A. For unloading purposes?

Q. Yes.

A. About nine cars.

Q. You are assuming they do not unload until they get down east of Nick's house?

[fol. 160] A. That is our regular team track and driveway from Cass Street to Miami.

Q. You can drive in anywhere along there, there is a driveway all the way along there?

A. Sometimes they drive, but there is not room to unload. It is not a regular driveway.

Q. It is on the level ground, and the cars when placed in on the team track, they are placed far enough so they do not foul the No. 1 track—they unload, don't they, every day in the week?

A. No, sir.

Q. Isn't it a fact that you can go there any day of the week and see them unloading cars from a point 50 feet east of that switch point?

A. No, sir.

Q. Did you ever go down there in the daytime when this track was filled with cars?

A. Yes, sir.

Q. And see whether they were doing any unloading there or not?

A. I have been there and seen that. They are unloading from Cass Street west.

Q. Don't you know on the morning in question they were unloading a coal car that was mostly west of that house on that track and it had been there from 5:20 o'clock in the morning until 7:00?

A. No, sir, I don't.

Q. That would surprise you, to know that is the fact, wouldn't it?

Mr. Wise: I object to that.

Mr. Ryan: All right, let it go.

The Court: It goes out.

Mr. Ryan:

Q. This track holds 18 cars, does it not, this team track?

A. I could not say positively.

Q. When you come down here on this team track it goes down through the station, doesn't it?

A. By the freight house.

Q. It goes up on the north side of the freight house—I [fol. 161] should say south of there and then crosses over across Canal Street into the Peru Heating Company's plant?

A. Yes, sir.

Q. You have cars extending many times all the way along this team track down past the freight house and you have them cut here for the street, and you have cars in beyond for the heating plant, don't you?

Mr Wise: I object to that.

The Court: He may answer.

The Witness: Not during the time the freight house is open.

Mr. Ryan:

Was it your object and purpose to do all the kicking of cars in on the team track before the men came to their work, is that what you have in mind?

A. I don't switch the cars.

Q. No, but you told counsel that the purpose of the switching movement in the morning was to do something with reference to the time the men came to work in the freight house and the unloading began. What was it you said about that?

A. I said the switching crews did the work on these tracks just before seven o'clock, before the freight house opens, so that the freight handlers and the people who are to unload the cars from the team track could get their service.

Q. In other words, you do not aim to do any switching of the cars after seven o'clock, is that it, on to the team track?

A. That is it.

Q. Now, just getting back to that, as a matter of fact you have it done at six thirty, don't you, customarily?

A. Along about that time.

Q. Isn't it a fact that the switching crew that do the work get off the job at six thirty every morning, unless they are late, after filling in the team track with cars?

[fol. 162] A. I don't know what time they leave their duty.

Q. Their time records would show what time they customarily quit, wouldn't they?

A. Yes, sir.

Q. Have you Broadway on this plat here?

A. Yes, sir.

Q. How far is it from Nick's house—would you place your rule in there, please (indicating)—it is about 1600 or 1700 feet, isn't it?

A. No, sir.

Q. Measure it.

A. It is about 700 feet.

Q. That is 50 feet to an inch, that scale?

A. Yes, sir.

Q. How long is your rule?

A. Six inches, 300 feet.

Q. You went from the center of his house?

A. That is good enough.

Q. That is 12, isn't it?

A. No, sir, that is the first six, that is three.

Q. I don't think you understand me.

A. May be not.

Q. This is a six inch rule, isn't it?

A. Yes, sir.

Q. Place it opposite Nick's house again, about the center, put that in the center.

A. Yes, sir.

Q. That is six inches to there—make a mark—that is one 6 inches?

A. Yes, sir.

Q. Now, come on again another 6 inches. That is 12 inches, isn't it (indicating)?

A. Yes, sir.

Q. All right, now.

A. That is 600 feet.

Q. All right. There is another 6 inches, that is 900 feet, and you are not at Broadway yet, are you?

A. No, that is 100 feet, making 1,000 feet.

Q. It is 1,000 feet from Nick's house down to Broadway, isn't it?

A. Yes, sir.

[fol. 163] Mr. Wise: How much did you say?

Mr. Ryan: 1,000 feet, according to actual measurement.

Q. What is the distance across these tracks here at the place opposite Nick's house from the north rail of the team track to the south rail of the switching track, the most southerly track? Will you put your ruler on that?

A. The track next to the Wabash River?

A. Yes.

A. That is the most southerly track.

A. Yes.

A. 58 feet.

Q. You answered counsel that Nick could have gone down to Broadway and crossed over there without crossing any track?

A. No, sir, I didn't say that.

Q. Where would a man have to go if he went down to Broadway and crossed the tracks, how would he get back?

Mr. Wise: I object to that.

The Court: He may answer.

Mr. Wise: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. Ryan:

Q. Suppose he came down Canal Street to Broadway and crossed over here at the street, how would he get back to a car or shanty about opposite his house here, on the south side of the right of way, how would he get up there?

A. Walk on the south side of the southerly track.

Q. Is there a place there that you can walk between the river and the lead?

A. Yes, sir.

Q. He would have to cross some of the spur tracks, wouldn't he, he would have to pass by that bottling works and he would h-ve to cross that spur track, wouldn't he?

A. No, sir.

Q. Isn't there a spur track leading from the lead to this shop here (indicating)?

A. Yes, sir.

Q. That might be filled with cars, might it not?

[fol. 164] A. There is sufficient room between that shop and the end of the track to walk around.

Q. You would not expect a man to walk 2,000 feet to cross the tracks to go 50 feet?

Mr. Wise: I object to that.

The Court: Objection sustained.

The Witness: I would if they were switching there at the time.

Mr. Ryan:

Q. Did you ever hear of a railroad man that had a right to be on railroad premises, section men, track men or switchmen that would walk 1,000 feet to go around some standing cars in order to cross to a given place?

Mr. Wise: I object.

The Court: Sustained.

The Witness: Yes, sir.

Mr. Ryan: Well, if the witness answers after the Court sustains the objection——

The Court: It may be stricken out.

The Witness: Pardon me, your Honor.

Mr. Ryan: I would like to pursue the inquiry if I might, your Honor.

The Court: Objection sustained. Go ahead.

Mr. Ryan:

Q. Suppose this team track in front of Nick's house was lined up with cars both east and west and they were switching, taking cars off the lead, off the south side of the switching lead and pulling them away up west seven or eight hundred feet, that could not be observed if there was a string of standing cars there, could it?

A. But the——

Q. No, no, just answer the question.

A. It could be.

Q. You think a man can see through a box car, do you?

The Court: Oh, well, go to something else, Mr. Ryan.

Mr Ryan:

Q. How high is a box car?

[fol. 165] A. A box car, 12 or 14 feet.

Q. If the switching crew takes a string of cars off that lead and pulls them back on to the main track and at that

time they have to go back approximately 800 feet to get to the switch from the main track on to the house track, there would be no chance for a man standing down at this house to see that, would there?

A. Yes, sir.

Q. He could still see that, notwithstanding the track curves and the track was filled with box cars?

A. Yes, there is a clear vision.

Q. You mean he could look through the freight cars?

Mr. Wise: I object to that, he didn't say that.

The Court: Objection sustained.

Mr. Ryan: Are you going to put in these pictures I agreed to let you put in?

Mr. Wise: Yes, I thought I would.

Mr. Ryan: Put them in now, will you, and mark them.

Mr. Wise: Yes, I want the jury to get a clear view of this matter.

Mr. Ryan: Put everything in that you have there.

Mr. Wise: I have got three or four that I showed you. Some don't mean anything.

Mr. Ryan: I would like to have them all in. I object to any unless you put them all in.

Mr. Wise: All right.

Mr. Ryan: That is my agreement with you.

The Court: Anything further with this witness?

Mr. Wise: To give you an idea of the width of the tracks, I have a little plat here that might go in.

Mr. Ryan: Where are the two pictures that you gave me?

[fol. 166] Mr. Wise: Those are all the pictures I have.

The Court: Anything further with this witness?

Mr. Ryan: Will you mark that as your exhibit, just that one.

Mr. Wise: Are you going to put this one in (indicating)?

Mr. Ryan: You are going to put them all in?

Mr. Wise: Just put them in now.

Mr. Ryan: All right, have them marked.

Mr. Wise: Please mark this document as Defendant's Exhibit 2.

(Whereupon document referred to by counsel was marked as requested Defendant's Exhibit 2.)

Mr. Ryan: Some pictures have writing on the back showing the way the camera was facing, but we can agree that this is a view of the team track with the camera stationed some distance east of Nick's house and looking evidently toward the west.

Mr. Wise: That is right.

Mr. Ryan: Now, Mr. Bertram, calling your attention to Defendant's Exhibit 2, do you see this picture, this photograph?

A. Yes, sir.

Q. Do you recognize it as the house in which Nick lived?

A. I do.

Q. Do you recognize this little shed back of this as the one you said was eleven feet back of the track?

A. I do.

Q. At the time that picture was taken these tracks were empty?

A. Yes, sir.

Q. What is that in the distance that shows down there (indicating)?

A. This is a car on the spur track.

Q. A car on the spur track away down?

A. Yes, sir.

Q. You understand, of course, that photographs do not show distances relatively correct? They may appear to be a great distance or very short distances, depending on where your camera is set.

A. I guess they do.

[fol. 167] Q. But they do show approximately the curve of that track, do they not?

A. Yes, it does.

Q. You recognize that as the track?

A. Yes, sir.

Q. Suppose this track was filled with cars down there, down to the switching point, do you think a man standing here could see what was going on 800 feet beyond?

A. Yes, sir.

Q. Where could he see?

A. This is the section tool house in plain view, and the switch engine would necessarily have to pass in front of that tool house.

Q. And there might be cars on the spur track just like there is in this picture.

A. That is all the cars that the spur track could hold.

A. You still think if this track was filled with cars a man could look from this point (indicating) down there and see them down at the switch on the main line?

A. Yes, sir.

Q. When they are approximately 900 feet from him, that is the distance, isn't it?

A. Yes, sir.

Q. And you think that the standing cars on the team track would not obstruct his view down that far?

A. No, sir.

Q. Well, suppose they were not all the way down to the switching lead from the main, on to the first house track, suppose they were halfway between the end—they were down about 500 feet or 400 feet from that point, could he see them?

A. He could.

Q. Where could he see them at that time?

A. He could see them on the first track north of the main.

Q. Do you mean to say that this curve with cars on it would not obstruct his view of the other cars south of the main or house track?

[fol. 168] A. It would not.

Q. At the point I have indicated.

A. No, sir.

Q. Your first answer was he could see to the right because of the great distance, he could see beyond that standing car?

A. Yes, sir.

Q. Suppose they were further east and between the point where the track commences to curve—

Mr. Wise: I object, I think that is going a little too far. He is arguing with the witness.

The Court: I think the last question is a question.

Mr. Ryan: I had not finished it, your Honor.

The Court: Go ahead.

Mr. Ryan:

Q. Suppose that the cars were between the switching lead from the main on to the first house track which you say is 900 feet, suppose they were somewhere being moved in between that and the switch lead from the house track on to the team track, which you say is 270 feet from Nick's house, suppose they were somewheres in between, could a man standing in here (indicating) see these cars?

A. He could. The photograph shows that right there (indicating).

Q. Suppose—there are no cars on the track, is there?

A. No.

Q. I am asking if he could see them if this track was filled with cars.

A. From what point?

Q. From the point right here where it starts to curve to the south. Will you take that picture and show this jury how a man could see them there?

Mr. Wise: I object to that.

The Court: Objection sustained.

Mr. Ryan: Do you want the jury to see this picture now? [fol. 169] The Court: Go ahead with the cross-examination and get through with the witness.

Mr. Ryan:

Q. Were you at the scene of the accident shortly after it happened upon the day in question?

A. Yes, sir.

Q. What time did you get there?

A. I got there the same day or the next day.

Q. Were you present when these photographs were taken?

A. No, sir.

Q. Do you know when they were taken?

A. I know just about what time.

Q. Do you know the day or time of day?

Mr. Wise: I object to that.

The Witness: No, I don't.

Mr. Wise: I object to that because counsel has admitted the photographs.

Mr. Ryan: That would not preclude me from finding that out.

Mr. Wise: It is not material, whether this witness knows or not. He asked that they go in the evidence and put them in.

The Court: He may answer, if you know.

The Witness: Will you please read the question?

Mr. Ryan: While we are on this other subject, your Honor, Mr. Wise asked me if I would agree to let the photographs go in without bringing his photographer from Indiana, and I said yes, but that does not preclude me from showing when the pictures were taken, surely.

Mr. Wise: I am not going to argue that point with you.

Mr. Ryan: Isn't that the fact?

Mr. Wise: Not exactly. I told you I had some pictures here if you wanted them.

The Court: If you want to argue that go out in the hall. [fol. 170] We will take a recess. Gentlemen, do not talk with anybody about this case, or permit anybody to talk in your presence and refrain, so far as you can, from forming any judgment about the case until you hear the argument and the instructions of the Court; and come back at two o'clock. You gentlemen can argue that out in the hall. The Court has ruled.

(At this point jury leaves the courtroom, and the following proceedings were had out of the hearing and presence of the jury:)

Mr. Wise: Mark these pictures, Mr. Reporter.

Mr. Ryan: I object to it.

Mr. Wise: I am offering the photographs in evidence. Counsel said he would admit the photographs.

The Court: Now, what is the objection?

Mr. Ryan: Here is my proposition. Mr. Wise asked me last night, he showed me some photographs, and I said, let me look at them, and maybe we can agree that it will not be necessary for you to bring your photographer here, and we agreed that they might go in, but I did not agree with him that he could put in these photographs unless they were taken some time within a reasonable time after the accident, and if they were taken too long after the accident or taken on a Sunday morning when no cars were on the tracks—I don't want any inference from the admission

of these pictures that they were taken during customary operations.

Mr. Wise: I will admit they were not taken then.

Mr. Ryan: I have the right to know now.

The Court: You did agree to let the pictures go in and the question is whether from your examination, whether they properly represent the conditions?

Mr. Ryan: Yes, sir.

[fol. 171] Mr. Wise: I am willing they should do that and show when——

Mr. Ryan: Why don't you tell me when the pictures were taken and by whom?

Mr. Wise: I don't know. I will find out during the noon hour and tell you.

The Court: There is no quarrel between you at all, really.

Mr. Wise: Not at all. Here is what I understood—don't get mad.

Mr. Ryan: I am not mad at all.

Mr. Wise: Yes, you are. You said you wanted me to put them all in.

Mr. Ryan: Yes.

Mr. Wise: Yes. You said, "I want them all in or nothing."

Mr. Ryan: I will concede that.

The Court: They are all in.

Mr. Wise: They are all in. Anything I can do to help to show when they were taken I will do.

Mr. Ryan: Why don't you let me ask the witness?

The Court: That is all.

Mr. Wise: The reporter will please mark these photographs Defendant's Exhibits 3 to 8, both numbers inclusive.

(Whereupon documents referred to were marked as requested Defendant's Exhibit 3 to 8, both numbers inclusive, in evidence.)

[fol. 172] Whereupon an adjournment was taken by this Court to Wednesday, April 6, 1927, 2:00 o'clock P. M.

Wednesday, April 6, 1927—2:00 o'clock P. M.

Court convened pursuant to adjournment.
Counsel present as before.

The Court: Proceed, gentlemen.

HENRY A. BERTRAM, a witness called on behalf of the defendants, having been previously sworn, resumed the stand for further examination and testified as follows:

Cross-examination (continued).

By Mr. Ryan:

Q. The question I asked you that does not seem to be answered is, were you present when the photographs were taken?

A. No, sir.

Q. You don't know personally how they were taken?

A. No, sir.

Q. One answer you gave as to certain measurement: I think there is a slight correction, perhaps it is on account of the way I asked the question. From the south line of the switch track to the north rail of the team track measuring straight across is what distance?

A. 65 feet.

Q. Did you take all of these other measurements personally from block to block or did you take them from some [fol. 173] old drawing.

A. I took them altogether from the plat.

Q. You had a plat of the streets?

A. Yes, sir.

Q. And copied that into your plat.

A. Yes, sir.

Q. How long is the freight house from east to west?

A. Freight house, it is about 130 feet.

Q. Did you make these drawings and measurements for the purpose of this case?

A. Yes, sir.

Mr. Ryan: That is all.

Mr. Wise: I just want to ask one question.

Redirect examination.

By Mr. Wise:

Q. Mr. Bertram, referring to this plat, I want you tell what the distance is from the house that the plaintiff lives in, right here, on the north track, the team track, No. 3, up to the point where the clearance point,—where it cuts across north going by the track No. 2.

A. It is 140 feet.

Mr. Ryan: He has answered that.

Mr. Wise: How is that?

The Witness: 140 feet.

(Witness excused.)

The Court: Call your next witness for the defendant in this case.

William Lynch, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wise:

[fol. 174] Q. What is your name?

A. William Lynch.

Q. Where do you live, Mr. Lynch?

A. Peru, Indiana.

Q. What is your business?

A. Trainmaster.

Q. Trainmaster for whom?

A. Chesapeake & Ohio Railroad.

Mr. Ryan: I did not hear the last.

The Witness: Chesapeake & Ohio Railroad.

Mr. Wise:

Q. Speak up, Mr. Lynch. The defendant in this case? The defendant?

A. Yes, sir.

Q. How long have you been trainmaster?

A. Eleven years.

Q. Have you been in the employ of the company more than that?

A. Been employed by the company twenty years.

Q. Twenty years, and you have been trainmaster at Peru, Indiana, for eleven years?

A. Yes, sir.

Q. Are you familiar with the yards of the railroad of the Chesapeake & Ohio Railroad Company in Peru?

A. Yes, sir.

Q. What are your duties with respect to that?

A. I have general supervision over the men employed in that service, in the yard service.

Q. Over the switchmen?

A. Switchmen.

Q. And trainmen?

A. Trainmen.

Q. Trackmen?

A. I have no jurisdiction over the trackmen.

Q. Have you any jurisdiction over the section hands?

A. No, sir.

Q. Did you know about this accident that happened on March 16, 1926?

A. Yes, sir.

Q. Were you familiar with the methods and operation of switching in those yards around about that time?

A. Yes, sir.

Q. And prior to that time?

A. Yes, sir.

Q. Do you know the way that the tracks are located?

A. Yes, sir.

Q. The track and house track as shown by this plat, Defendant's Exhibit 1?

A. Yes, sir.

[fol. 175] Q. Taking the team track number 3, where were the cars usually placed on that track for unloading?

A. For unloading?

Q. Yes.

A. East of Cass street.

Q. Is that east of the house where the plaintiff lived?

A. Yes, sir.

Q. When were the switching operations made by the switching crew to place those cars on the team track and on the house tracks for unloading purposes as a rule?

A. Between six and seven A. M.

Q. Where did those cars come from?

A. Well, they came from the lower yard, switch yard or inbound trains.

Q. That is, west of the ——

A. West of the team track.

Q. West of the team track and west of where this man lived?

A. Yes, sir.

Q. What was the usual practice of bringing those cars in from those yards to the west?

A. From the lower yards to the team track?

Q. Yes, to the team track and the house tracks?

A. The general practice was to pull them out through the crossover, up the main line and back.

Q. Where was the crossover on the main line at the time this accident occurred?

A. At that time it was just about opposite this man's house, as I recall it.

Q. Well, I will show you the plat that is in evidence here and ask you if that correctly represents the crossover just about south of Cass street there?

A. That is correct.

Q. That is the way it was March 16, 1926?

A. March 16, yes.

Q. At what time were men engaged in unloading cars on the team track and on the house tracks supposed to go there [fol. 176] to begin their work?

Mr. Ryan: That is objected to.

A. Seven A. M.

The Court: Well, what time they were supposed to does not mean anything. What time did they?

Mr. Wise:

Q. What time did they?

A. Seven A. M.

Q. Well, did you have any rule about that or any system?
A. No particular rule except if those cars were properly set.
Q. That is, they were not to start their unloading until the cars were spotted or properly set?
A. Properly set, yes.
Q. Now on the morning of this accident there were some cars that were west of Cass street in front of Nick's house and to the west of that?

Mr. Ryan: I object to that unless he knows about it.

Mr. Wise:

Q. Well, was there? Do you know whether there was? It is already in the evidence that there was.

The Court: He may answer. Do you know whether there were or not?

A. I don't know whether they were there or not.

Mr. Wise:

Q. Well, I will put it this way: If there were some cars to the west of Cass street and to the west of the house where Nick lived, were they properly set for unloading on that team track?
A. They were not.

Mr. Ryan: I object to the form of the question, if your Honor please. I object to asking him if they were properly set for unloading.
The Court: I did not hear you, Mr. Ryan. I did not hear what you said.
Mr. Ryan: He is asking this man if the cars were west [fol. 177] of the house, a hypothetical question, if they were west of the house, if they were properly set for unloading.
The Court: Well, he may ask him where was the proper place to set them for unloading. Where was it?
The Witness: They were not properly set for unloading.
Mr. Ryan: I move to strike it out.
The Court: I think it may stand. Go ahead.

Mr. Wise:

Q. Where would the cars be when they were properly set for unloading on the team track?

A. East of Cass street.

Q. East of Cass street?

A. East of Cass street.

Q. And that is east of the place where Nick lived?

A. Yes, sir.

Mr. Wise: That is all.

Cross-examination.

By Mr. Ryan:

Q. Mr. Lynch, you have a yard check on all your cars, do you not?

A. We keep a check, yes, sir.

Q. When do you make that check, what time in the morning?

Q. What time in the morning?

Q. Yes, what time is the check made of the cars on this team track?

A. After the team track is set and the house, that would be after seven o'clock.

Q. Well, it is customary, is it not, to make a check of the team track at seven o'clock each morning? It is not?

A. After seven o'clock, after the cars are properly set.

Q. Well, you make your check at seven, do you not?

A. Seven and beyond. After seven o'clock, not before seven.

Q. Well, but the man who goes around to check up these cars on the various tracks makes a check at a certain time, does he not?

A. Not always.

Q. How?

A. Not always.

[fol. 178] Q. Isn't it customary and wasn't it the custom and practice in your yards there for a man to go over to the team track each morning and make a check of the cars on team track number 3 and make a record of it, permanent record?

A. After seven o'clock, after the cars were set.

Q. You mean a few minutes after?

Mr. Wise: I object to that.

A. I cannot say what time.
The Court: He may answer.

Mr. Ryan:

Q. Well, you know his report check reads seven o'clock each morning.
A. Well, it should read seven o'clock. It is not always he gets there.
A. All right. Now he makes another check at night.
A. We make no check at night.
Q. You only make it each morning?
A. Each morning.
Q. So that you can go back to your permanent records and tell this court and jury just how many cars were on team track number 3 at seven o'clock each morning?
A. Those records are kept. I think there is a record of those cars.
Q. And it would give the numbers of the cars, too, would it not?
A. Yes.
Q. So that if it was necessary to trace them or trace their origin, you could do it?
A. Yes, sir.
Q. You do not know personally how many cars were on this team track, do you?
A. Personally, no, I was not there.
Q. Well, have you looked at any records that would impart that information to you?
A. Yes, I have seen records that indicated——
Q. Have you seen a record of the check of this track this morning at seven o'clock.
[fol. 179] A. On that particular day, yes, there were three cars on that particular team track.
Q. I have not asked you that. I say, have you looked at the records to see what cars were on this team track?
A. Yes.
Q. You have looked at them. When?
A. Well, that was probably shortly after the accident. I don't know just what date.
Q. Where did you see these?

A. At the yard office.

Q. In whose possession were they?

A. The yardmaster's.

Q. Who made the record?

A. Well, I don't know which clerk it was that made the record.

Q. Who is the man that made the check of this team track on the morning in question?

A. I don't know.

Q. This team track, you have cars coming in there, you have freight coming in from various places for the different industrial concerns around, do you not?

A. We have no industrial cars set on that track.

Q. Well, all the unloading is done from team track number 3 to the outside industries, is it not?

A. Well, very few cases.

Q. Well, don't you unload brick, coal, and all kinds of commodities?

A. If we unload brick, we have a brick yard at the end of number 1 house track where we unload brick.

Q. But alongside of this team Track and between where you go down to the freight house there is a level driveway there where teams and trucks drive in and out there and load and unload their merchandise, is there not?

A. Oh, yes, there are some of those commodities unloaded on that track.

[fol. 180] Q. Do you know how long that particular coal car has been on that track at the time of this accident?

A. I do not.

Q. Do you know what cars were immediately adjacent to it or what they were loaded with?

A. I do not.

Q. The check of the track at seven o'clock would simply indicate what cars were on the track at that particular time?

A. The number of cars.

Q. Other movements may be made during the day, cars placed in and other cars taken out, and all that, may they not?

A. It can be done.

Q. It is done that way in regular railroad business, is it not?

Mr. Wise: I object to that.
The Court: He may answer.

A. It can be done.

Mr. Ryan:

Q. Well, during the night, during the night time before seven o'clock, before six o'clock are any cars kicked in or out of team track number 3?

A. Cars are taken out after six o'clock.

Q. Well, you mean that you do all your switching on to team track number 3 between six and seven?

A. Well, not necessarily, but it is ready for—ready to be switched after six o'clock.

Q. Well, but they switch in and out of there any time, do they not?

A. They may occasionally set a car in there.

Q. Well, you had a switch crew at work that night, did you not, sometime from the middle of the night up to 6:30 in the morning.

A. The crew went to work at eleven P. M.

Q. The crew went to work at eleven P. M. What time did they quit?

A. Seven A. M.

Q. Didn't they quit at 6:30?

A. No, sir.

[fol. 181] Q. They did not quit at 6:30?

A. No, sir.

Q. What were they doing between eleven A. M. and seven o'clock?

A. Between what time?

Q. Well, you said eleven, didn't you?

A. Eleven P. M. until seven A. M.

Q. Well, from eleven P. M. until seven A. M. During these eight hours, what were they doing?

A. Well, they were making up trains, classifying freight in the classification yard, switching cars in the lower yard.

Q. Were they taking cars in and out to the house tracks or changing them or segregating them?

A. No, sir.

Q. When you get a car unloaded you take it out and send it back home or use it for other purposes, don't you?

A. We have certain times as a rule to pull those tracks?

Q. But you do not pull them out until you get the loads off them, do you?

A. How is that?

Q. I say, you do not clear the track until you get the cars unloaded, do you?

A. Well, yes, after a certain time in the evening why there is not anybody working around those cars, we pull them out and set the empties out and push the loads back.

Q. Do they do any unloading there at night?

A. No, sir.

Q. Nothing unloaded at night. Now suppose you had several empty cars down east of where you had two or three loads. You could pull out the string and take out the empties and put the loads back in for unloading, could you not?

A. We could do that, yes.

Q. That is done right along, isn't it?

A. Occasionally that is done, yes.

Q. And you know the cars are liable to be moved in and out on a team track at any time?

A. Yes, sir.

Q. Mr. Lynch, let me ask you, wasn't it the uniform cus-[fol. 182] tom and practice there before kicking cars in on that team track to warn everybody about it?

A. Only those who were engaged in unloading the cars.

Q. Well, you did not say, "We are just going to warn you men that are unloading the cars now;" you gave a warning, didn't you, whatever it was?

A. All those that were working on the cars.

Q. Well, anybody around there, of course, would get the same warning?

A. If anybody else except those whose duties required them to be there. It would not be necessary for us to warn them.

Q. But you apprehend that workmen knowing that custom would have a right to rely on it?

Mr. Wise: I object to it.

A. There is a rule that takes care of that.

Mr. Ryan: I withdraw it.

Q. Do you want us to understand that this warning or notice you gave to men working about the cars was exclusively to those men only when you are going to kick cars in?

A. Exclusive for men only that were working on or about those cars.

Q. All right. You had inspectors inspecting them every once in a while, didn't you?

A. Not at that point.

Q. Didn't you have men inspect these cars that very morning?

A. Not at that point.

Q. Didn't he go up and down the team track there and make his inspection?

A. Those cars that were in on this team track had been previously inspected before they were set there.

Q. When were they inspected?

A. Well, I cannot say that.

Q. Isn't it a fact—have you got a man named Stewart, an inspector, W. J. Stewart?

A. Well, I do not just recall that name. Now there are lots of those fellows that I do not know by name.

[fol. 183] Q. Well, you have men whose duty is to inspect these cars, the handholds and the other equipment, to see they are O. K. and make a report on them?

A. We have car inspectors, yes, sir.

Q. Now these men might at any time be working around these cars?

Mr. Wise: I object to that.

A. Not at that point.

The Court: Sustained.

Mr. Ryan:

Q. Well, at seven o'clock an inspection is made, is it not?

A. It is made, but not at that point where these cars were.

Q. Doesn't he go up and down the track and inspect all places?

A. He goes up and down tracks in the classification yard.

Q. Don't railroad men in the railroad business have to cross railroad tracks at all times?

Mr. Wise: I object to that.
The Court: He may answer. I think he may answer.

Mr. Ryan:

Q. Don't men working about your yards have to cross these tracks? Isn't that part of their business and duty to cross the tracks?

A. In some cases.

Q. Well, don't you think that your company owes men any duty to warn them of——

Mr. Wise: I object.
Mr. Ryan (continuing): Kicking cars?
The Court: Objection sustained.

Mr. Ryan:

Q. Well, suppose you knew that switchmen or section men were crossing the track going to their work, about the time they were due at work, would you consider that warning or notice that you were kicking in cars included these men?

[fol. 184] Mr. Wise: I object to that.
The Court: Sustained.

Mr. Ryan:

Q. You did not have anything to do with the section men, did you?

A. No, sir.

Q. Sir:

A. No, sir.

Q. But you did know that this custom prevailed anyway with reference to men working about or on these cars being unloaded, didn't you?

A. Your question, I do not just understand it.

Q. Well, I understood you to say that you would notify or warn men working about the cars before you were going to kick cars in, didn't you?

A. Men whose duties required them to be on or about those cars.

Q. Well, if you saw anybody around or about cars, either on top of them or alongside of them, would you investigate

to find out whether he was at work unloading or whether he was doing something for the Railroad Company?

Mr. Wise: I object.
The Court: He may answer.

A. The rule requires us to stop our engine.

Mr. Ryan: I move to strike it out.
The Court: No, what was being done.

Mr. Ryan:

Q. Just answer my last question.
A. What would I have done?
Q. No, no, that was not the question. Read the question.

(Question read.)

The Court: Go ahead.
A. Well, in that case if the cars were properly set for unloading, and they were suppose- to be there, I would stop and go and notify them that we were going to move those cars.

[fol. 185] Mr. Ryan:

Q. Suppose the car was farther west than the customary place of unloading and you saw men working on them actually unloading them, would you notify those men?
A. If I actually saw the men there, which would be an improper place for them to be?
Q. Yes.
A. I would take the same procedure that they were when properly set. I would notify them if I saw them.
Q. Even though you knew it was improper, you would go and warn them if you saw them?
A. I would, certainly.
Q. But of course you would not ever expect they might be there?

Mr. Wise: I object.

A. I would not figure they would be there.

The Court: He has answered. Go ahead.

Mr. Ryan:

Q. Suppose you had a string of cars extending from the freight house and east of Cass street up beyond and west of the house several cars and you saw men unloading down at the freight house, you would warn them, wouldn't you?

A. If I saw them, yes.

Q. They could unload anywhere east of Cass street properly in your estimation, is that it?

A. That is the designated team track, east of Cass street.

Q. Anywhere east of Cass street they might unload?

A. Yes, they unload any place east of Cass street.

Q. That is what I say. That is my question. Now suppose you had a string of cars extending west of that, loaded cars, would you draw your line of demarcation exactly at Cass street, so that a man might properly unload on the east side and not on the west side?

A. Yes, those instructions are up.

[fol. 186] Q. In other words, you would hold up a loaded car if you were not able to get them in past the dividing line?

A. Yes.

Q. What is the sense or reason of that?

Mr. Wise: I object to that.

The Court: Sustained.

Mr. Ryan: I withdraw it.

Q. What is the reason for that?

A. Because there is no place to drive there.

Mr. Wise: I object.

The Court: Sustained. No further.

Mr. Ryan:

Q. How long does it take to unload a load of coal?

A. Well, that depends.

Q. How many tons of coal does one of those gondola cars hold?

A. About fifty tons.

Q. And it stands there until it is unloaded?

A. Yes, sir.

Q. And the person who buys that coal has the right to use his own means to unload it?

A. Yes.

Q. And the company has to hold it there two or three days for that unloading; that is correct?

A. That might happen.

Q. He does not always have the same spot to unload; you have the right to shove it up and down to suit your convenience?

A. We place it on the team track.

Q. Yes, but you have a right to place it any place on the team track?

A. Any place on the team track, designated place to unload cars.

Q. I say, any place within your unloading zone, you have a right to shift it around?

A. Yes, sir.

Q. But he has a right to rely upon it being there until he gets the load out?

[fol. 187] A. We do not disturb that track after it is set.

Q. If as a matter of fact you had a string of cars for unloading east of Cass street, being unloaded, and a string of cars west of Cass street with loads in them, if you kicked in cars you would disturb not only the cars not properly being unloaded but also disturb the ones being properly unloaded, too, wouldn't you?

A. Not in this case.

Q. If you kicked them hard enough you would, wouldn't you?

A. You would have to kick them awfully hard.

Q. But there is such a thing as kicking them awfully hard?

The Court: Now you are arguing with the witness.

Mr. Wise: Yes.

Mr. Ryan: That is all.

The Court: Call another.

J. B. Pope, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wise:

Q. What is your name?

A. J. B. Pope.

Q. Where do you live, Mr. Pope?
A. Peru, Indiana.

Mr. Ryan: I do not think your man should be back with the witnesses. There is a rule excluding witnesses. There is a man sitting here with you.

Mr. Wise: Now there has been nobody back in that room. Where do you want Mr. Lynch to go?

Mr. Ryan: I don't care where he goes.

Mr. Wise: Here is Mr. Lynch. Where do you want him to go. Do you want him in here?

[fol. 188] Mr. Ryan: I want him at the table, so far as I am concerned. I do not want him to go back where the other witnesses are.

The Court: What is all this difficulty here, gentlemen?

Mr. Wise: About where this witness should go now. Mr. Ryan did not want him the same place. I don't know just where——

Mr. Ryan: I did not want him to go in with the witnesses. They were excluded, Mr. Wise. You understood what I asked.

Mr. Wise: Where do you want him to go?

The Court: Have him stay in the court room.

Mr. Ryan: Counsel is facetious.

The Court: You gentlemen must fight it out when court adjourns. You had your chance at noon. All right. What further? Anything further with this witness?

Q. You have given your name, have you?
A. Yes, sir.
Q. Where do you live?
A. Peru, Indiana.
Q. And whereabouts in Peru?
A. 305 South Broadway.
Q. What is your business?
A. Switchman for the C. & O.
Q. How long have you been with them?
A. Since the 23rd of February, 1923.

The Court: All right. Anything further with this witness? Gentlemen, you are killing time.

Mr. Wise:

Q. What did you say your business was?

The Court: Switchman for the C. & O.

A. Switchman for the C. & O.

Mr. Wise: Just a minute, your Honor, I think he is conductor on the switching crew.

The Court: He says he is a switchman.

Mr. Wise:

Q. What position do you occupy with the switching crew?

A. In charge of the crew.

[fol. 189] Q. In other words, you are the conductor of the crew?

A. Yes, sir.

Q. How long have you been conductor of a switching crew?

A. How is that?

Q. How long had you been conductor of a switching crew say prior to March 16, 1926, when this accident happened?

A. I have been in business as extra man off and on.

Q. How long had you been working in these yards at Peru prior to March 16, 1926?

A. About three years.

Q. Three years. Were you in charge of the crew all that time?

A. No, sir, not all the time.

Q. How long were you in charge of the crew prior to that time?

A. Oh, I worked on the crew extra, I couldn't tell you that exactly.

Q. You could not tell exactly. Well, was it sometime, some considerably time?

A. Yes, I averaged about half the time.

Q. You were familiar with the yards there in which these switching operations are conducted, are you?

A. Yes, sir.

Q. And you know the location of the various tracks?

A. Yes, sir.

Q. The team track, house track, and the lead track that joins or connects with the main track?

A. Yes, sir.

Q. What time of day would you usually go to work on that job?

A. I went to work at eleven o'clock that night.

Q. Eleven o'clock at night, and how long was your——

A. Eight hours, until seven in the morning.

Q. Eight hours to seven in the morning. How long had you been doing that prior to the time of this accident?

A. I was helping on that job regular.

Q. What?

A. I was regular helper on that job, regular.

[fol. 190] Q. Regular on that job?

A. Yes, sir.

Q. During that night where were you conducting the switching operations?

A. On the east lead of the train yard.

Q. Well, were you back in what they call the lower yards?

A. Yes, sir.

Q. Those lower yards, so-called, were to the west of the freight house?

A. Yes, sir.

Q. About how far?

A. Oh, about two blocks.

Q. How?

A. Two blocks.

Q. What time of the morning, what time during your shift did you usually conduct your switching operations in connection with setting cars in this team track and house tracks?

A. Between six and seven o'clock.

Q. In the morning?

A. Yes, sir.

Q. Was that the last work that you did on your shift?

A. Yes, sir.

Q. What did that work consist of?

A. Well, we spotted the house cars in there.

Q. What is that?

A. We spotted the house cars in the house and any loads we had for the team track.

Q. And you spotted the cars on the team track?

A. We spotted the——

Q. Spotted the cars, placed them for unloading?

A. Yes, sir.

Q. On this team track number 3. Looking at this place, where did you generally place the cars for unloading on the team track?

A. We placed them east of Cass street.

Q. Now when you started your switching operations for those tracks that morning, how many cars did you have?

A. We had nine cars.

Q. Was the engine on the front or on the east end or the west end of those cars?

[fol. 191] A. Well, it was on the east end of them until we——

Q. When you came out of the yard?

A. When we came out of the yard, yes, sir.

Q. The cars were going east, weren't they?

A. Yes, sir.

Q. They were going east?

A. Yes, sir.

Q. And the engine was on the front end?

A. On the east end, yes, sir.

Q. Just what did you do after you left the yards?

A. Well, we picked the cars up and crossed over from the train yard to the main line, and then back down west to the switch that entered into the house track lead there off the main line, and dropped the cars there, dropped them into the——

Q. Where was this crossover? Showing you the plat, Defendant's Exhibit 1, where was that crossover to the main track with reference to the freight house, say, or with reference to the place that this plaintiff lived?

A. Well, it is about opposite his building here.

Q. Just about opposite where he lived?

A. Yes, sir.

Q. Where were you on that shove of cars?

A. I rode the engine up through the crossover.

Q. What?

A. I rode the engine up through the crossover and got off at the crossover.

Q. Did you get off at the crossover?

A. Yes, sir.

Q. The cars then went down to the main track, didn't they, crossed over to the main track?

A. Yes, sir.

Q. Did you have any occasion at that time to examine the team track and house tracks?

A. Yes, sir.

Mr. Ryan: I object to the form of the question.

The Court: He may answer. He has answered.

A. Yes, sir.

Mr. Wise:

Q. Did you observe any cars standing on the team track?

[fol. 192] A. There was three cars there.

Q. There was what?

A. Three cars.

Q. Where were they standing with reference to the house where the plaintiff lived?

A. They were standing right in front of his house.

Q. Do you know what kind of cars they were?

A. Two box cars and a part load of coal.

Q. Were there any cars standing on track number 2, that is, the house track just south of the team track?

A. No, sir.

Q. What called your particular attention, if anything, to the cars that were standing on the team track?

A. To see if I had room to drop them in there.

Q. See what?

A. See if I had room to drop the cars in there from the main line.

Q. That you were switching?

A. Yes.

Q. Then after the engine went back, or after the cars went back up on the main line to the switch into the team track and house tracks, what did you do then?

A. Well, I started in against them with the engine.

Q. How is that?

A. I started in from the main line up against the cars with the engine.

Q. Well, did you make the switch?

A. Yes, sir.

Q. When you made that switch, when that switch was made and you turned into the switch that leads to the team

track and house tracks off the main line, about how fast was your train going?

A. You mean when I dropped the cars?

Q. Yes.

A. Oh, they were going, I should judge, about five miles an hour.

Q. Who was working with you in connection with making that switch?

A. Switchmen Kolb and Thomas.

[fol. 193] Q. Where was Switchman Kolb?

A. He was on the second car from the east end of the cut.

Q. Who cut the engine off?

A. Mr. Thomas.

Q. He was on the engine?

A. Yes, sir.

Q. When the engine was cut off, was the train slacked up?

A. Yes, it slacked them up when he took the slack. You have to get the slack to pull the pin out, slacked the cut of cars.

Q. When you went into that switch about where the tool house stands——

A. Yes, sir.

Q. You say the cars were going about four or five miles an hour?

A. About five miles an hour.

Q. Did you observe anybody at or near those three cars that were standing on the team track?

A. No, sir.

Q. Did you look to see?

A. Why, I did when I was up there at the crossover.

Q. Yes. Did you look to see if there was anybody there?

A. No, I didn't see a soul.

Q. You saw nobody around there?

A. No, sir.

Q. Was there anybody in the cars or on this coal car?

A. No, I didn't see nobody.

Q. If there had been a truck on the other side, north side of the coal car, could you have seen it?

A. No, sir.

Q. Was that coal car in the position where cars are usually placed for unloading?

A. No, sir.

Q. Where were the cars usually placed for unloading?

A. East of Cass street.

Q. Was it part of your duties to spot the cars in the various places for unloading?

A. Yes, sir.

[fol. 194] Q. And it was customary to place those cars on the team track east of Cass street for unloading?

A. Yes, sir.

Q. That was always done before seven o'clock in the morning, was it?

A. Well, yes, as soon as we could get to it. About half the time or a little better it was done that way.

Q. How?

A. Over half the time it was. Some mornings we did not get in there until seven o'clock.

Q. Do you know how those cars stood, that is, where was the coal car with reference to the box cars?

A. It stood east of the box bars.

Q. The two box cars were west of the coal car?

A. West of the coal car, yes, sir.

Mr. Wise: All right.

Cross-examination.

By Mr. Ryan:

Q. Mr. Pope, you went to work at 10:30 that night, didn't you, 10:30 P. M.?

A. No, sir.

Q. Didn't you work from 10:30 P. M. on the 15th until 6:30 A. M.?

A. No, sir.

Q. On the 16th?

A. No, sir.

Q. Weren't these your regular hours?

A. No, sir.

Q. Did you ever tell anybody they were?

A. No, sir.

Q. Well, then you went to work at eleven o'clock or 11:15?

A. Yes, sir.

Q. Were you switching cars during the night and early morning?

A. Yes, sir.

Q. About how many cars did you move in and out of the team track during that time?

A. Well, I didn't move any out of there; I was taking nine in there.

[fol. 195] Q. Was that the first move you made on the team track that night?

A. Yes, sir.

Q. How many did you move into the house tracks or on to the house tracks?

A. I did not move any out of the house tracks; I had seven cars—six cars for the house tracks.

Q. How many cars did you switch or move that night for seven or eight hours there before you got down to this last move?

A. Oh, I couldn't say exactly.

Q. Well, you moved a lot of them, didn't you?

A. Yes, sir.

Q. Where did you move them to?

A. I moved them up and down the lead to different tracks in the train yard.

Q. Didn't you move any down to the freight house or team track?

A. Not until I went in with these nine cars.

Q. Where did you pick up these nine cars?

A. Picked them up in the train yard.

Q. Where is the train yard with reference to where the switch is leading over to these tracks?

A. Two blocks west.

Q. Two blocks west?

A. Yes, sir.

Q. In order that we may understand this, you are familiar with this plat, I take it?

A. Yes, sir.

Q. And you know where the crossover is from the switch leading over on to the main track?

A. Yes, sir.

Q. You say it was opposite or nearly opposite Nick's house?

A. Yes.

Q. And you pulled these cars down the switch lead from the west down so that you could get to this crossover to go back west on to the main, is that it?

A. Yes, sir.

[fol. 196] Q. Now was that the first time you made any movements of cars with reference to the freight house or the number 1 or 2 tracks?

A. Yes, sir, it was, that night.

Q. Your other work prior to that had been confined to the yards proper?

A. All in the yards.

Q. Was it dark or daylight at this time that you reached that crossover?

A. No, it was daylight.

Q. You could see the three cars clearly over on the team track?

A. Yes, sir.

Q. Now will you give me the location of the three cars that you say were on that track at that time?

A. Well, they were standing in the clear on number 3, that is, put them right opposite to Nick's house.

Q. Which car was opposite Nick's house?

A. The coal car.

Q. The coal car was opposite Nick's house, then you had two box cars west of that?

A. Yes, sir.

Q. Now you are sure of that?

A. Yes, sir.

Q. Do you know how long a coal car is, that coal car?

A. About forty foot.

Q. What is the length of the average box car?

A. Around thirty-six.

Q. Well, your cars are either thirty-six or forty feet, aren't they?

A. Yes, sir.

Q. You had one more car, that is fifty feet long, haven't you, furniture car?

A. Yes, sir.

Q. You didn't have any of them in on that track?

A. No, sir.

Q. Now then, were there any cars just east of Nick's house?

A. No, sir.

[fol. 197] Q. That is the track was clear, was it?

A. Was clear, yes, sir.

Q. Down to the freight house?

A. Down to the freight house, yes.

Q. You are sure of that?

A. I know it.

Q. You remember that just as well as if it was yesterday?

A. Yes, sir.

Q. And this coal car, of course, is a gondola car, that is not a high car, is it?

A. No, sir.

Q. How high is the floor of the gondola car?

A. Oh, I don't know exactly.

Q. Well, it is just over the truck. How high is the load of coal on the car?

A. Well, some of it is loaded sometimes about a foot higher than what the top of the car is.

Q. You have a box on a gondola car. How high is the box on a gondola car, the sides of it?

A. I think it is in the neighborhood of four and a half or five feet.

Q. And then you have coal piled up on top of that?

A. Yes, sir.

Q. But you can see a man working on the side of the car shoveling coal out, can't you?

A. I could if he was there.

Q. I mean if he was there. You could not see him if he was not there. But if you saw him there shoveling you would suspect he was shoveling into a truck or something if he was in there shoveling with his coat off?

A. Yes, if he was in there working.

Q. You answered the question. You could not see a truck if it was on the other side right up flush with the side of the car?

[fol. 198] A. Yes.

Q. You knew that was the side they unloaded from, didn't you?

A. Yes, sir.

Q. Nick's house is just a little west of Cass street, isn't it?

A. Yes, sir.

Q. Cars also were customarily unloaded just east of Cass street?

A. Yes, sir.

Q. And of course, if cars were being unloaded, if the cars had been just east of Cass street and being unloaded, you could not see a truck alongside of that any more than you could alongside of Nick's house, could you?

A. No, sir.

Q. You have a conductor's, yard conductor's switch list, don't you?

A. Yes, sir.

Q. Did you have the numbers of those nine cars?

A. No, sir, I didn't have the numbers of them.

Q. What train did they come in on?

A. They come in on various trains during the night.

Q. Did you take those out of one train?

A. No, they come out of two locals, 94 and other trains.

Q. Where did you get them?

A. Down at the train yard.

Q. Then you knew from your records what those car numbers were and where they were going, didn't you?

A. Yes, sir.

Q. That is, you took them out of several trains and bunched them together?

A. Yes, sir.

Q. Because you knew you wanted to put them in on the team track?

A. Yes, sir.

Q. You wanted to put in all nine on the team track?

A. No, I didn't want to put all nine on the team track. I wanted to put two cars of cinders I had on the east end of the cut.

Q. Two cars of cinders on the east end of the cut?

[fol. 199] A. Yes, sir.

Q. Did you have a car of meat in the train?

A. No, sir.

Q. Are you sure you didn't?

A. I know it.

Q. You didn't have a car of meat in the train?

A. No, sir.

Q. Then you only had two cars in the nine which you wanted to put in on the team track?

A. Yes, sir.

Q. And the reason you observed these three cars so closely, that is, the coal car and the two box cars, was because you wanted to ascertain if you had room to drop the nine cars in on that track?

A. Yes, sir.

Q. Now where were the cinder cars with relation to the east end of the drag?

A. They was on the east end of the cut.

Q. What were the cars next to the cinder cars? Were they empties or loads?

A. Empties.

Q. All empties. Were they all box cars?

A. Yes, sir.

Q. All box?

A. Yes, sir, except one car was loaded with merchandise out of train 94.

Q. The west car was a car of merchandise?

A. Yes.

Q. What was that, meat?

A. No, sir, it consisted of general merchandise.

Q. That was the one you wanted in down at the freight house?

A. Yes, sir, the one I wanted in on the rear end of the team track.

Q. When you say rear end, what do you mean?

A. That is the east end of it.

Q. In other words, your purpose was to get that ahead of the cinder cars, was it?

A. Yes, sir, I wanted to get it because when I backed up the house tracks, I pulled my other car off to clear [fol. 200] number 3, and then pulled number 3 and put this car in on the rear.

Q. Let me understand you. You say you had two cinder cars on the rear end which you wanted to put on that track?

A. Yes, sir.

Q. Then you had those empty cars that you did not want in there at all?

A. Yes, sir.

Q. Then the ninth car, the west car was a car loaded with merchandise?

A. Yes sir.

Q. And that one you wanted to place east of the freight house or east of the cinder cars?

A. East of all cars.

Q. East of all cars?

A. Yes, sir.

Q. Did you put your cars in order up in the train yard when you knew you wanted to place them as you stated?

A. Yes, sir.

Q. Why didn't you place your merchandise car on the east end?

Mr. Wise: I object to that.

The Court: I have not heard the question yet. Go ahead.

Mr. Wise: It has nothing to do with this accident.

The Court: Go ahead.

Mr. Ryan:

Q. Why didn't you place the cinder cars on the east end if you wanted them to go down to the east end?

Mr. Wise: I object.

The Court: He may answer.

A. I put them that way to save switching over there.

Mr. Ryan:

Q. Let us see how much you saved yourself. Which way was your engine headed when you pulled down from the west toward the east to get to this crossover?

A. It was headed east.

Q. Were you pulling the cars at that time?

A. At the time when I came out of the train yard I was, yes, sir.

[fol. 201] Q. Were you pulling the cars when you came down the side track to the crossover?

A. Yes, sir.

Q. The engine was headed east and had nine cars, didn't you, to the west?

A. Yes, sir.

Q. You pulled them down beyond the crossover?

A. Yes, sir.

Q. If this jury rail was that side track, you came down here and took the whole string down east of the crossover switch and then pushed them back on the main track?

A. Back west.

Q. I understand. You pushed them back further from in front of Nick's house, down to the tool house?

A. Yes, sir.

Q. About nine hundred feet?

A. Yes, sir, about that.

Q. Then you had to push the engine and everything down to that point, didn't you?

A. Yes, sir.

Q. Now after you got down to that point, did you stop? You stopped your train, did you?

A. Yes, sir.

Q. Then you are on the main track now?

A. Yes, sir.

Q. With your nine cars and engine headed east on the main track?

A. Yes, sir.

Q. Where were you at that time?

A. I was at the switch, at the tool house.

Q. And the switch there leading from the main line over on to number 1 house track?

A. Yes, sir.

Q. Your purpose in going up there was to get up there where you could get on to number 1 house track, wasn't it?

A. Yes, sir.

Q. All right. Now then, you started down on number 1 house track?

A. I dropped the cars before I started down there.

Q. Oh, did you go back far enough west to drop them [fol. 202] before the switch was made?

A. Yes, sir.

Q. Well, where was the uncoupling being made? Where did you uncouple the engine from the nine cars?

A. You mean when we had the engine on the east end of them?

Q. Yes, when you were coming east?

A. That was down west of the tool house on the main line there.

Q. What was your purpose in doing that?

A. So that I could cut off the engine and let the cars roll in on the house track, let them roll by me.

Q. You had ample space to do that after you got on to number 1 house track, didn't you?

A. No, sir.

The Court: I think we have had enough of this switching now, Mr. Ryan.

Mr. Ryan: What is that?

The Court: I think we have had enough of the switching operations.

Mr. Ryan: Your Honor, this is important. I was leading up to something.

The Court: Then I would go right to what you are leading up to.

Mr. Ryan: Your Honor, I want to make this plain. I am leading up to something. Let me show you this point. Your Honor, I wish you would look at this plat for a minute, will you?

Mr. Wise: I think he has answered your question.

Mr. Ryan: Now counsel does not understand what I am going to do. Neither does the court.

The Witness: You see here (indicating)——

Mr. Ryan:

[fol. 203] Q. I am leading you up to the tool house, up to the switch.

A. Yes.

Q. Look here. Here is where you took the crossover, isn't it?

A. Yes.

Q. You come down on the main track about nine hundred feet to the tool house?

A. To go west.

Q. To go west again, when as you say you made an uncoupling of your engine at the switch leading to number 1 house track?

A. Yes, sir.

Q. And stopped, and let the train follow?

A. Yes, sir.

Q. My question is, didn't you have ample time and opportunity to do that after your train got on the house track and before you got down to the team track switch?

A. No. I had to drop them here because I had to have room to drop the cars in there.

Q. Do know how far it is from the switch where you go on number 1 main down to the switch to number 3?

A. I know I ain't had room to drop them there.

Q. Don't you know it is about five hundred feet?

A. Yes, but there ain't room enough to drop them cars.

The Court: He is asking you the distance, Mr. Pope.

Mr. Ryan:

Q. Isn't that about five hundred feet?

A. Practically about five hundred feet.

Q. All right. In that five hundred feet you had ample time to speed up and slow down your engine enough to get in the slack and make that cut and then let your engine go on and let your cars go in in this team track here; Isn't that the move?

A. No.

Mr. Wise: I object. That is not what he said at all.

The Court: Objection overruled. Is that true, Mr. Witness? Did you have——

A. Why, I didn't have room unless I cut off and went in and shoved them cars.

[fol. 204] Q. Now you say you gave the cars sufficient momentum so that after you cut the engine off the cars followed the engine?

A. They followed it towards the team track.

Q. Do you know how far you were from the team track, at the place you say you made the cut of your engine from the nine cars?

A. I suppose four or five hundred feet, along there.

Q. All right. Did you give the cars sufficient momentum so that they would run that four or five hundred feet and then go on down and take the switch and go in on the switch?

A. Yes, sir.

Q. You did. And your engine in the meantime was racing on ahead of it to get out of the way, wasn't it?

A. It stopped right in here, just to clear.

Q. Did you stop on the main track with your engine?

A. Yes, sir.

Q. You did not go on the house track with your engine at all?

A. Not until I headed in with the cars and went up to make that switch.

Q. You said you had room on the team track for the nine cars?

A. I had room in here for the nine cars, from here to the team track.

Q. Then you did not have room on the team track for the nine cars?

A. No, unless I went in and shoved them up and made room.

Q. So you went down and got beyond the first switch on the main track?

A. Yes, sir.

Q. And then let the nine cars come after you?

A. Yes, sir.

[fol. 205] —. Was anybody riding the nine cars?

A. Yes, sir.

Q. Who was riding them?

A. Mr. Kolb.

Q. Was he the rear man or head man?

A. He was the rear man.

Q. Is that track on a level there?

A. Yes, sir.

Q. That track was on a level?

A. Yes, sir.

Q. Did you have brakes on these cars?

A. Yes, sir.

Q. Which end, which car was he on when he was riding them?

A. I think he was on the second car. I know he was on the rear end. I wouldn't say for sure the first or second car.

Q. He had a clear view of the three cars standing on that track?

A. Yes, sir, he had a clear view.

Q. He could see whether anybody was working around there or not?

A. I wouldn't say whether he could see anybody working there; he had a clear view of the cars though.

Q. Do you know how fast those cars moved as they came on down that four or five hundred feet?

A. I should judge about four or five miles an hour.

Q. About four miles?

A. Yes.

Q. So that they just gently——

A. Moved on in there.

Q. They just gently moved in, and when they hit the three cars standing with the brakes set, with loads on them, of course they stopped?

A. I don't know whether the brake was set or not. I could not say they were. I could not say they were not. It is not customary to set brakes on the team track. It is a level track.

Q. Well, did you know whether the load of coal was on that car or not?

A. It was part loaded; they had been working on it.

[fol. 206] Q. How long had they been unloading it?

A. I don't know.

Q. But you noticed that it was a part load?

A. Yes, sir.

Q. And it was broad daylight at the time?

A. Yes, sir.

Q. Where were you? Were you still back at the switch, or did you get on the engine?

A. I stayed at the switch until the engine came back down and went in on the engine.

Q. So you were about nine hundred feet from Nick's house when this happened?

A. Yes, sir.

Q. Did you hear the noise of the impact or was it sufficiently violent?

A. I didn't hear any noise.

Q. Do you know if the three cars were moved when the nine cars were——

A. They were moved some, sure. They were not moved very far. I should judge, oh, maybe two carlengths.

Q. How do you figure that they were moved two carlengths?

A. Because of the location they were standing when I went through the crossover.

Q. Then the engine came back and got you, did it?

A. Yes.

Q. On the main line?

A. Yes, sir.

Q. Then did you go down to your merchandise car with your engine?

A. I started down there.

Q. The merchandise car was where when you got down?

A. The merchandise car was on the west end of the cars next to the engine.

Q. Where was it with reference to the switch leading on to number 3 team track?

A. Oh, it was standing west of number 3 switch there quite a ways.

[fol. 207] Q. How much west?

A. Oh, I couldn't say exactly how far it was.

Q. Well, give us your best notion about it?

A. I should say it was standing there maybe two hundred feet.

Q. Two hundred feet west of the switch leading into the team track?

A. Yes, sir.

Q. And did you tie on to that car then?

A. I didn't get down to tie on to the car. I met a man and he told me Nick got hurt, and he said to call a doctor.

Q. Now your next movement if Nick had not been hurt?

A. Pick up these cars and leave the two cinder cars in the team track.

Q. Leave the two cinder cars next to the two box cars?

A. Yes, sir.

Q. Then take the empties and merchandise car back west? Where did you go?

A. Down to number 2 house.

Q. Where did you go with the merchandise car?

Mr. Wise: I object to going so far into that.

The Court: Sustained.

Mr. Ryan:

Q. Let me ask you if this is not what you were doing that morning: Isn't it a fact that you were making a drop of nine cars in on the house track number 1? Isn't that where you intended——

A. I dropped the nine cars in towards the team track.

Q. Isn't it a fact you intended to place the nine cars on house track number 1?

A. No, I only had——

The Court: "No" answers it.

Mr. Ryan:

Q. Just answer that. Wasn't that your usual move?

The Court: He said "No." Is that your answer?

A. Yes.

[fol. 208] Mr. Ryan:

Q. Isn't it a fact that your switch is customarily locked on team track number 3?

A. No, sir.

Q. Is it ever locked?

A. Not as I have ever seen.

Q. What is that?

A. Not as I ever seen a lock on it.

Q. Are you sure these nine cars went to the place you intended them to go?

A. They went on the team track, yes, sir.

Mr. Wise: I object.

The Court: Sustained.

Mr. Ryan:

Q. Isn't it a fact that the switch, instead of being closed for number 3, was open, and that you went with your engine, describing the movements you have made coming east, and made the cut, and your engine went on down on the main, and that the nine cars went in in the wrong place?

A. No, I intended previously to go in there, because I had lined the switch when I went through the crossover.

Q. You were making what you call a flying switch?

A. Yes, sir.

Q. That is what you call a flying switch?

A. Yes, sir.

Q. That movement is contrary to the rules of your company, isn't it?

Mr. Wise: I object to that.

The Cou-t: He may answer.

A. Well, not exactly, no.

Mr. Ryan:

Q. You say what?

A. Not exactly, no. There is places we have to make them.

Q. Now wasn't there a perfectly logical way to get these cars——

The Court: Now I would not argue with him. You are going a little far afield. What further?

[fol. 209] Mr. Ryan: Let me ask one thing, your Honor. Then I am through.

Q. Couldn't you have placed your two cinder cars by making just three movements and place them in where you santed them placed and got your merchandise car ahead of them without making a flying switch?

Mr. Wise: I object to that.

A. No, sir.

The Court: He has answer- it. Go ahead. What further?

Mr. Ryan: Well, just one thing.

Q. Where would you say the east end of this coal car was with relation to Nick's house when you say you saw them standing down there?

A. Standing right in front of the house.

Q. I mean, there are two ends, the car thirty-six or forty feet long. The east end of the coal car, was it east of Nick's house or a little west or where?

A. No, it was right in front of the house.

Q. That is, you think the east end of the car was about even with the center?

A. No, just about even with the east side of the house.

Q. There was nothing east of that at all?

A. No, sir.

Mr. Ryan: All right, that is all.

The Court: Call another.

LOUIS L. KOLB, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wise:

Q. What is your name?
A. Louis L. Kolb.
[fol. 210] Where do you live?
A. Peru.
Q. Who were you working for in March, 1926?
A. C. & O. Railway.
Q. The defendant in this case?
A. Yes, sir.
Q. How long have you been working for the railroad?
A. About three and one-half years.
Q. What are your duties?
A. Helper on the engine, brakeman.
Q. On the switch crew?
A. Yes.
Q. Are you familiar with the C. & O. yards at Peru, Indiana?
A. I am.
Q. You have been working in those yards for three years, you say?
A. On and off for three years.
Q. Now on March 16, 1926, the day of this accident, you recall that, don't you? You recall the day of this accident?
A. Yes.
Q. That this Nick was hurt?
A. Yes.
Q. What time did you go to work the night before?
A. Eleven o'clock.
Q. What was the length of time of your shift?
A. Eight-hour.
Q. From eleven o'clock till seven in the morning?
A. Eleven to seven.
Q. Were you working on any switching operations during the night, during the night previous to the morning of the accident?
A. Yes.

Q. Where was that?

A. In the lower yard.

Q. In the lower yard, just to the west?

A. West of the——

Q. Of where this accident occurred?

A. West of where the accident occurred?

Q. Were you in there—how long were you in the yards working in there?

[fol. 211] A. Oh, about seven hours and a half, something like that.

Q. This switching operation on this house track, was that the last operation that morning?

A. The last thing we did.

Q. Was that the last work you usually did on that shift?

A. Yes, that would be the last thing we would do, would be practically the last thing we did every morning.

Q. What was the purpose of that?

A. Why, out of the trains that came in and during the night, we would have manifest merchandise and things like that, and the idea was to get it to the house by seven o'clock and get t spotted for the teams and for the freight house men.

Q. Now when you came out of the lower yards that morning, how many cars did you have?

A. Nine.

Q. And where was the engine?

A. On the head end.

Q. On the east end?

A. On the east end, headed east.

Q. And where were you when you came out of the yards?

A. On the rear of the cut.

Q. You were on the rear or west end of the cut of cars?

A. West end of the cars, yes.

Q. Where did the cars move there after you started?

A. Headed east through the crossover.

Q. Where is that crossover located——

A. East——

Q. —with reference to the freight house and where Nick lived?

A. West of the house, west of the freight house and west of his dwelling.

Q. Showing you, calling your attention to that plat there that is in evidence, does that plat correctly show where the crossover was?

A. Yes.

Q. This is the main line and that is the lead track (indicating)?

A. Yes.

[fol. 212] Q. Well, when you got down to that crossover, what did you do?

A. I dropped off at between the switches.

Q. About where with reference to the crossover did you drop off?

A. About in the middle of the switches.

Q. Did you have any occasion to notice any cars that were on the team track, track number 3, the north track?

A. Yes, I had noticed; I would have occasion.

Q. Did you look over there?

A. I did.

Q. Did you see anybody around the cars?

A. Nobody.

Q. How many cars were there?

A. Three.

Q. What kind were they?

A. Two boxes and a coal car.

Q. Where was the coal car with reference to the two box cars?

A. On the east end of the cut.

Q. And with reference to the house where Nick lived, where were these cars set?

A. Parallel or back of him, right back of the house.

Q. You mean just south of the house?

A. South of the house.

Q. After the trainmen, after your cars went back to the switch near the tool house that leads into the house track, where were you then?

A. Probably in the same position, or probably moved down ready to go in on the cars.

Q. Were you on the cars?

A. On the first or second, I do not recall.

Q. First or second. Well, as you crossed that switch in there, did you?

A. That would be the head end of the cut going in.

Q. Did you see anybody around the cars when the cut went into the team track?

A. I saw no one.

Q. From the lead to the team track?

A. No.

Q. Could you see from where you were?

A. All I could see would be the right hand side of the car.

Q. You could not see the north side of the car?

[fol. 213] A. I could not see the north side, no, sir.

Q. You were on the south side of the cars you were riding?

A. Yes, dropping in, riding in on the south side.

Q. About how fast were these cars going when they started in after the engine cut off and they started in the lead to the house track?

A. About five miles an hour.

Q. About five miles an hour. Was that the usual speed at which cars generally were kicked in on the switch track?

A. That would be dropped speed or switching speed, yes.

Q. How far did they have to go then after that, after the engine left them?

A. How far? I don't understand the question.

Q. About how far that was from the switch at the tool house?

A. Oh, into the team track, you mean?

Q. Yes.

A. I don't quite understand your question, Mr. Wise.

Q. Well, when the engine left them and drew ahead of them, they went into the switch to the house track, didn't they?

A. Yes. About three car lengths, I imagine.

Q. And then after that they went down that lead and they got to the switch of the team track, didn't they?

A. It worked out that way, yes.

Q. You don't know how far that would be?

A. Yes, that *about* be around a hundred and fifty, two hundred feet.

Q. You can refresh your recollection from this plat that is in the record. The switch was nearer the tool house, was it? That switch was nearer the tool house?

A. Yes.

[fol. 214] Q. And the switch going into the team track was down here (indicating)?

Mr. Ryan: Mr. Wise, I wish you would ask him about that without showing it.

Mr. Wise: I will ask him where they are then, if he will look at the plat and tell me where the switch is located that leads into the house track, the first switch off the main line?

A. About here.

Q. Indicating where the tool house is?

A. That is the first switch there.

Q. Yes. Now then, the cars went down that track, house track number 2, wasn't that house track number 2 or the lead to it?

A. The straight lead would be 1.

Q. Show then where the switch is that goes into the team track.

A. This would be located here then (indicating).

Q. Can you tell about how far, what distance that is?

A. No, it would be six or seven carlengths, around two hundred and forty feet.

Q. Do you know how far it is from the tool house to where this man lived, Nick?

A. No.

Q. You cannot tell the distance. Did you see these cars that had been standing on the team track after this accident occurred, happened.

A. I did.

Q. Did you look at them?

A. I did.

Q. Did you handle them after that?

A. I think we shoved in, yes.

Q. Did you pull them out or switch them around after that, after the accident happened?

A. I do not recall that we handled the cars after that, that is, after the accident. Of course——

Q. Were they broken or damaged, or anything wrong so that they could not be operated?

[fol. 215] A. Nothing wrong, there wasn't.

Q. Were you on that cut of nine cars when they struck the other cars?

A. Either the first or second car.

Q. Were you on when they came together?

A. Yes.

Q. Did you notice any particular crash, or anything unusual about the coming together of those cars?

A. No, nothing unusual, except that they would be a different kind of noise, that is, being there was some empty cars, when it hit, it might seem a little bit louder than if they had been loads.

Q. Did it jar you, or was there anything unusual?

A. Nothing unusual about the crash.

Q. Different from switching operations at that time?

A. Nothing different.

Mr. Wise: That is all.

Cross-examination.

By Mr. Ryan:

Q. Did you go down on your cut of nine cars, down to the crossover on the switching lead?

A. On the rear of the cut. You mean coming out of the lower yards?

Q. Yes.

A. Yes, I was on the rear.

Q. Well, you went down to the crossover?

A. Yes.

Q. You had to pass down near Nick's house, didn't you?

A. Yes, the engine would be about right parallel, back——

Q. They would have to get your car to the east to make the crossover back, wouldn't they?

A. Yes.

Q. That would take you down a little east of Nick's house?

A. It would be about there, yes.

Q. Mr. Kolb, do you remember anything about this at all?

A. Well, I was there, if that is what you mean.

Q. That is about all you remember, isn't it?

[fol. 216] Mr. Wise: I object.

A. I was there on that morning.

The Court: He may answer.

Mr. Ryan:

Q. Did you notice cars on the team track when you went down?

A. I did.

Q. Did you take particular notice of them?

A. I noticed the three cars, yes.

Q. How did you come to remember that?

A. Because it was my business.

Q. It was your business to notice how many cars were there?

A. Yes.

Q. And I suppose that was your business because you knew that was the track for unloading, did you?

A. Not that, no; that I had an idea where the cars was going to go and noted the clearance and things like that.

Q. How much clearance was there between the west end of the standing cars, the standing box cars and the switch on to number 3?

A. There might have been about three carlengths in there.

Q. Well, you wanted to drop nine, didn't you?

A. We had to drop nine; we dropped nine cars.

Q. You intended to drop nine, didn't you?

A. We did drop nine.

Q. Well, you did not have room for nine on the team track, did you?

A. That is different.

Q. Well, it may be different, but that is the fact, isn't it? You did not have room for any nine cars on the team track, did you, west of the three standing cars?

A. No, we did not have room.

Q. You say you had room for about three cars?

[fol. 217] A. We had room for maybe three cars.

Q. Three cars west of the three that were standing?

A. Three cars west of the three that were standing on the team.

Q. That is what I say?

A. Yes.

Q. You noticed the location of the three?

A. I noticed the location of the three.

Q. From the freight house?

A. Yes, sir.

Q. A coal car and two box cars?
A. A coal car and two box cars.
Q. The coal car right in fron- of Nick's house?
A. Nick's house.
Q. The whole track was clear down beyond that?
A. Beyond the other car, east of the cut, east of the coal car.
Q. Cass street wide open and the whole track, there was not a thing on that track?
A. The whole thing wide open.
Q. There was not a car on the whole track?
A. Nothing on it.
Q. Now your engine pushed these nine cars up the main track, away up beyond the switch, didn't it?
A. No, they pulled them up beyond.
Q. Did't it push them up?
A. Pulled them through the cross over up the main.
Q. Do you remember that distinctly?
A. I was there.
Q. Which was was your engine headed when you took the cars down from the yard, down to the crossover?
A. East.
[fol. 218] Q. Was it on the east end of the cut?
A. On the east end of the cut.
Q. Which was was the engine headed?
A. East.
Q. And pulled the cars down to the east?
A. Pulled the cars up.
Q. When did the engine get to the west end of that cut?
A. When?
Q. Yes, when and where?

Mr. Wise: I object.

A. One at a time.

Mr. Wise: Because the witness did not say that.
The Court: Is that true, Mr. Witness? What do you say about that? Read the question.

(Question read.)

The Court: You [illegible] in time?
Mr. Ryan: No, where did you change? You say you pulled down, the engine headed east until you go to the

crossover. Then I asked you if you did not push the cars back on the main line. You said you pulled them.

A. Pardon me. We are in on the team track?

Q. No, you are away ahead of me. I am still down at the crossover.

A. We were on the main line.

Q. Listen, Don't get ahead of me. I want you to answer. You have the engine headed east going down to the crossover. Your purpose was to go down on the switch lead and get where you could switch to the main line and back west?

A. Back up.

Q. You remember that?

A. Yes.

Q. Your engine did push these cars back on the main line towards the west, didn't it?

A. Yes.

Q. Now then, you pushed all the way back beyond the switch leading from the main line on to the first house track, didn't you, down beyond the tool house?

[fol. 219] A. Yes.

Q. And then you went on down beyond that about five hundred feet, didn't you? Isn't your memory very good?

A. It would not take five hundred feet. It would not be five hundred feet, no.

Q. Are you just reasoning that out or do you remember anything about it?

A. I was there.

Q. You have told us several times you were there. You are still there. We all understand that you were there.

A. All right.

Q. How far back west of the tool house did the engine push these cars?

A. Well, I am going to be—this is going to be no close, not to the engine, understand.

Q. Well, just calm yourself down. You were close enough?

A. About three hundred feet west of the switch, I imagine, maybe a little bit more.

Q. Then you stopped, did you?

A. Yes, sir.

Q. Where were you when you stopped just prior to making the eastward movement, where were you?

A. Up around the crossover switch.

Q. What did you do? Did you get off the cars?

A. When they backed down the main?

Q. Yes.

A. Yes, I dropped off.

Q. Where did you get off, at some switch?

A. Between the two crossover switches, around the crossover switches up there, possibly a little west of there.

Q. Listen. We got you away west of the crossover switch. There are switches, now, leading from the main track on to the house tracks and on to the team track, aren't there?

A. Yes.

Q. Where did you get off that cut with reference to any switches leading into the team track or house tracks?

[fol. 220] A. I got off at the crossover switch, at the only crossover switch there is. I didn't ride the rear of the cut down the main line.

Q. You stayed opposite Nick's house?

A. Right below Nick's house.

Q. What do you mean by "below"?

A. West of Nick's house.

Q. How far west?

A. About three hundred feet, something like that.

Q. What did you get off at that switch for?

A. Well, it was my intentions to go in on the cars, see, it was my intentions to note the position of things.

Q. Now the first switch west of that crossover let into number 1 house track, didn't it?

A. I believe that is the way it worked out.

Q. And that is where you got off, wasn't it?

A. Right around the crossover switch, in there.

Q. You got off and turned the switch?

A. I threw the switch.

Q. You did? You are sure you did?

A. I am pretty sure I did.

Q. You are sure you know what you are talking about, are you?

A. I think so.

Q. And you stayed there while the engine pushed on back beyond the tool house?

A. Yes, sir.

Q. Then when the cut came down to you again, after being separated from the engine, you got on again?

A. I got on either the first or second car.

Q. When did you do that, when the cars came back?

A. When they came by me.

Q. Headed east?

A. Headed east, yes.

Q. That was after this kick had been given when the [fol. 221] engine gave them sufficient momentum so they would go in on a certain track?

A. Yes.

Q. When they passed you, you boarded them?

A. I boarded them.

Q. Which car did you get on?

A. Which track?

Q. No, which car?

A. First or second car.

Q. Was it a load or an empty?

A. The second car would be an empty, as I recall it, I think.

Q. Was it a box car?

A. I don't think so.

Q. Well, do you remember?

A. I believe it was a gon coal car.

Q. Gondola, you mean?

A. Yes, cinder car.

Q. Did you operate the brake?

A. No.

Q. You did not put your hands on the brakes?

A. No, I rode on the ladder.

Q. On the side of the car?

A. On the side of the car.

Q. So that you could not see ahead very well there, could you?

A. No.

Q. You could not see down, what was going on down at the three standing cars?

A. Not on the left side, on the north side, I could not see.

Q. What was your purpose in getting on there?

Mr. Wise: I object to that.
The Court: He may answer.

Mr. Ryan:

Q. What was your purpose in getting on there?
A. If I—I think the idea at that time, my idea was to cut off three of these cars in there. I was going to ride down a piece on them. That was the only reason that I should have ridden them, to get off, make a cut after they got in there, after they cleared.
[fol. 222] Q. Did you have a car of meat in that train?
A. I don't remember.
Q. Did you take a car out of 94 and put it on the east end of that cut?
A. It would not be a meat car. It would be merchandise.
Q. I say, did you take a care out of 94 and put it on the east end of that cut?
A. I don't know. That was not my duty.
Q. Did you ever tell anybody——
A. Not a car of meat. Merchandise was on there. I know it was in there.
Q. You know it was in there?
A. Yes.
Q. Was it on the east end?
A. I do not recall the position of that car.
Q. These cars when the engine came back and separated from them they went in, all nine of them, in on number 3 team track, didn't they?
A. To clear, you mean.
Q. Yes—no, I mean the cars went in on number 3 track?
A. They headed number 3 team track.
Q. They did not take the switch that you opened, did they? They did not go in on the switch that you opened, did they?
A. Yes.
Q. They did?
A. I think they did.
Q. Not the switch that you opened?
A. The switch that I opened.
Q. You told me you opened the first switch west of the crossover, didn't you?

A. I am confused on the switch. The yards now and the yards a year ago are different.

Q. There is no difference, Mr. Kolb, except that they moved the switch up at the shanty down further east. The switch leading into the team track and the ones leading into the house tracks are in the same place now that they were then?

[fol. 223] A. They are the same place?

Q. Yes. You told me you opened the first switch there west of the crossover, the switch leading onto the house track?

A. It would be the team track switch, the switch I had thrown, the way the road run at that time.

Mr. Wise: He said the team track switch.

Mr. Ryan: Yes, but he placed it as the first switch west of the crossover.

A. I would think so.

Q. That is where you intended these cars to go?

A. Number 3 was where I intended.

Q. Number 3 was where they went to. You wanted them on the house track.

Mr. Wise: I object, if the court please.

The Court: What is the objection?

Mr. Ryan: Why are you objecting? He is taking care of himself.

The Court: Overruled. Go ahead.

Mr. Ryan:

Q. Isn't it a fact you turned that switch into the house track, the first switch west of the crossover, and that when these cars were brought back it was intended that they should go in on that switch that you opened, but instead of that they mistakenly went in on the team track? Don't you know that that is the fact?

A. No.

Q. And don't you know you were not on the cars at all at the time; that they switched in there before they ever got down where you were at all?

A. That they switched in?

Q. Yes, that they took the lead at the team track before they ever got down where you were?

A. That does not make any difference.

Q. All right. Let us see if it doesn't. Here is your crossover switch (indicating). Stand over here, Mr. Wise, [fol. 224] so everybody can see.

Mr. Wise: Sure.

Mr. Ryan:

Q. Here is your crossover switch.

A. That is the crossover.

Q. From your side track?

A. Yes.

—. Now you came down here on the side track. This one line means a track always, two rails. You came down and went over like this (indicating)?

A. Yes.

Q. In a northeasterly dire-tion, and then you got down beyond the switch point with your engine and cars and then you started to back up on this track, didn't you, on the main line?

A. Yes.

Q. All right. When you got back to this first switch here you got off and opened it, didn't you?

A. This is the inside, or the main line switch.

Q. Sir?

A. Is this the main line switch here (indicating)?

Mr. Wise: No.

Mr. Ryan: No.

Mr. Wise: That is the team track switch.

A. This is the team track switch.

Mr. Ryan:

Q. Now where did you get off after you got over this crossover, where did you get off? Didn't you get off here at this first switch?

A. No.

Q. Leading into number 1 house track? Haven't you so testified over and over again?

A. I got off between the crossovers.

Q. I understand.

A. Then I might have walked down here. This is the switch I am thinking I operated here (indicating).

Q. Will you put an "X" there at the switch you say you operated?

A. This is the team track—no, this is the team track switch.

[fol. 225] Q. Don't make a mark now unless you understand it.

Mr. Wise: Let him alone. He is going to make the mark in the right place.

A. Sure, this is the team track switch here (indicating).

Mr. Ryan: All right. I don't want him to make it in the wrong place. I want him to understand this. Here is your crossover, Mr. Kolb (indicating).

A. Yes.

Mr. Wise: If your Honor please, he has answered the question, and he placed the switch and has done everything, I think, he could do.

Mr. Ryan: He was going to place it in the wrong place. I didn't want him to say unless he understood it. Don't you want him to understand it? All right. We will just sit down.

Mr. Wise: All right. He said he opened the team track switch.

Mr. Ryan:

Q. Isn't it a fact this is the switch you opened right here, and that it leads into the house track number 1, and isn't this where you were going to put your mark for that switch?

A. That was because I was confused on the map. I am not an architect.

Q. That may be true.

A. Probably this is the switch.

Q. I appreciate that, sir. But let me ask you, there is the first switch that leads on to the house track; there is the one leading on to the team track. Do you want to say you opened the one leading on to the team track?

A. This is the switch we opened (indicating).

Q. That is the second switch from the crossover, isn't it?

A. This would——

Q. No, the switch you say now you opened is the second switch west of the crossover and not the first, isn't it?

[fol. 226] A. I will show you here.

Q. No, you don't have to show me. Answer. Will you answer the question?

A. No.

Q. Is it the second switch now west of the crossover?

A. I am a little bit confused on it. This is sworn tetsimony, and this one, this stub track is confusing.

Q. No, there is nothing confusing.

Mr. Wise: If the court please, he says he is confused.

Mr. Ryan:

Q. There is nothing confusing about it. Here is the crossover. Here is the first switch on to the house track.

A. No, the switches don't number that way at all. We are going right the other way.

Q. You had better tell the railroad about it, they are wrong on their drawing, if that is not right.

Mr. Wise: I think——

The Court: You had better stand over here.

Mr. Ryan: Mr. Wise knows if I have been misleading.

Mr. Wise: What he is trying to tell you, he opened the switch on to the team track.

The Court: Stand back.

Mr. Ryan:

Q. All right. Do you still think you opened the first switch or the second switch?

Mr. Wise: I object. He has been over it.

The Court: Answer it again. Which was it, the first or second switch?

Mr. Ryan:

Q. Will you just answer the question?

The Court:

Q. Was it the first or second switch, or do you know?

A. According to this diagram here——

Q. No, no. As you recollect it that night, did you open the first switch or the second switch?

[fol. 227] Mr. Wise: The first switch from where?

Mr. Ryan: From the crossover. That is all we have been talking about. Mr. Witness, will you give me your attention just a minute. I am not permitted to monkey with that plat any more. There are two switches west of this crossover. Now did you open the first one or not? Was it the first switch you opened, or not?

A. No, I can take them back the other way. It is the second switch from the main line, I think.

Q. All right. That is the first switch from the crossover west, isn't it? That is the first switch from the crossover going west and the second switch from the main line, and that is the switch on to the house track, isn't it?

A. It will be the second switch from the west main line switch. That is what it will be.

Mr. Ryan: All right, sir. Thank you very much. That is all.

Redirect examination.

By Mr. Wise:

Q. I just want to ask him—the switch that you have been talking about all the time, whether it is the first or second, is the switch that runs into the team track?

Mr. Ryan: I object to leading him.

The Court: Yes, that is leading.

Mr. Wise:

Q. Was it the switch that run into the team track, that led into the team track?

Mr. Ryan: I object to that as having been answered several times.

The Court: He may answer.

A. That was the switch I throwed, that directed the cars into the team track.

[fol. 228] Mr. Wise: All right. That is all.

The Court: Call your next.
Mr. Wise: That is all.

And thereupon the defendant rested its case.

The Court: Any rebuttal?

NICK MYHAS, the plaintiff herein, having been previously sworn, called as a witness on his own behalf, in rebuttal, testified as follows:

Direct examination.

By Mr. Ryan:

Q. This is the plaintiff, Nick Myhas, recalled.

Mr. Wise: In rebuttal.

Mr. Ryan:

Q. Nick, you have heard the testimony here about the place that it is claimed the cars were customarily unloaded as east of Cass street. What is the fact about it, as to where these cars were customarily unloaded?

A. East and west.

Q. How far west of your house, if at all, were these cars customarily unloaded?

A. Exactly, that is four hundred feet, four lengths of tracks.

Q. What?

A. Four hundred feet west.

Q. Four hundred feet?

A. Yes, sir.

Q. Well, how far is it from your house up to where the track curves on to the other track?

A. That is pretty close, about four hundred foot.

[fol. 229] Q. How far do you think it is?

A. About four hundred.

Q. Well, was that whole track there, after it curved, beyond the team track, was that used as an unloading track?

A. They have another little track in there, short track for two cars on the west my house.

Q. What was the character of the pavement, the driveway? Could teams and trucks drive in and out there?

A. Yes, sir, teams and trucks.

Q. When, as to what time, were these cars unloaded? When were they unloaded?

A. You can unload any time, spot a car in the lower end.

Q. Can you unload them any time?

A. Any time. I saw the trucks passing in front of my house.

Mr. Ryan: That is all.

Mr. Wise: That is all.

The Court: Evidence closed in the case.

Which was all the evidence offered or heard on the trial of the above entitled cause.

[fol. 230] DEFENDANT'S REQUESTED INSTRUCTION TO JURY REFUSED

And thereupon, at the close of all the evidence offered by and on behalf of both the plaintiff and the defendant, the defendant, by its counsel, presented to the court its motion in writing that the jury be directed to find the defendant not guilty, and with said motion presented to the court its instruction in writing to find the defendant not guilty, which motion and instruction are in words and figures as follows:

And now comes the defendant, by William G. Wise, its attorney, and at the close of all the evidence in said cause, moves the court to exclude from the jury all the evidence offered and received on the part and behalf of both plaintiff and defendant, and to give *to give* to the jury the following instruction:

"The court instructs the jury to find the defendant not guilty."

Wm. G. Wise, Attorney for Defendant.

The court instructs the jury to find the defendant not guilty.

Refused.

[fol. 231] But the court overruled and denied said motion and refused to give said instruction to the jury and marked

said instruction "Refused," to which action and ruling of the court in so overruling and denying said motion and in refusing to give said instruction to the jury and in marking said instruction "Refused," the defendant, by its counsel then and there duly excepted.

PLAINTIFF'S REQUESTED INSTRUCTIONS GIVEN TO JURY

Thereupon the court, at the request of the plaintiff, gave to the jury, on behalf of the plaintiff, the following instructions:

You are instructed that the plaintiff's declaration in this case consists of three counts. In each and all of said counts, it is alleged that the plaintiff was employed by and was at work for the defendant in interstate commerce at the time of the accident and injury complained of, and that his employment rendered it necessary for him to be in and upon the premises of the defendant at the place in question and to cross the track in question; that the defendant, then and there, by reason of the premises, became and was subject to a certain act of Congress, known as the Federal Employers' Liability Act, relating to the liability of common carriers by Railroad to their employees while engaging in interstate commerce.

Given.

[fol. 232] In the first count, it is alleged that while the plaintiff was crossing the said track and while he was, then and there, and prior thereto in the exercise of ordinary care for his own safety, the defendant, then and there, so carelessly, negligently and improperly operated and moved certain freight cars upon and over the said track aforesaid, that as a direct and proximate result thereof, one of said cars ran upon and against and came into contact with the plaintiff, thereby causing the injury complained of in this case.

The second count alleges that there was a long string of freight cars standing upon the said track aforesaid; that at the time of the accident in question and long prior thereto, it had been the established practice and custom of

the defendant to give notice and warning to all persons who were in or about the said standing cars before moving or starting the same or before kicking or shunting other cars in and upon and against the said standing cars; that said practice and custom was, then and there, and prior thereto known to the plaintiff and relied upon by him; that while he, the plaintiff, was lawfully crossing the said track in the due course of his employment, and while he was, then and there and prior thereto, in the exercise of ordinary care for his own safety, the defendant, then and there, carelessly, negligently and improperly, contrary to the said established practice and custom and without notice or warning to the plaintiff and others engaged at work in and about the cars, moved, kicked, and propelled other freight cars with great force and violence upon and against the said standing cars aforesaid, thereby causing the injury complained of.

[fol. 233] The third count alleges that the said track was usually and customarily occupied by divers standing freight cars in the process of unloading; that it had been the established practice and custom of the plaintiff and other employees of the defendant to pass across and over the said track and to pass between or over cars then and there standing thereon, all of which facts the defendant knew, or could have known had it exercised ordinary and reasonable care for the safety of the plaintiff; that it was, then and there, and for a long time prior thereto had been, the established practice and custom of the defendant, when said cars were standing on said track and while they were being unloaded, to give due notice and warning to all persons in or about the said cars before starting or moving the same or before moving or propelling other cars with violence upon and against the said standing cars; that the plaintiff knew of said practice and custom and relied upon it; that while the plaintiff, in the due course of his employment, was crossing the said track and between certain of the said standing cars aforesaid, the defendant, without notice or warning to the plaintiff, moved and propelled other cars upon and against the cars standing on said track, at a high, dangerous and excessive rate of speed and with unusual and unnecessary force and violence; that as a direct and proximate result of the negilgence of the defendant as aforesaid, the plain-

tiff, then and there, sustained the injury and damages complained of in this case.

The defendant, by its plea, denies that it is guilty of the negligence as alleged in the plaintiff's declaration or any or either of the counts thereof, and the defendant by its plea also avers that the plaintiff was not in the exercise of ordinary care for his own safety and that he was guilty of contributory negligence; that he was acting without the [fol. 234] scope of his employment and was attempting to pass between said cars solely for his own convenience; that it had not, at the time of the accident or prior thereto, been the practice and custom for the employees of the defendant to pass over or between cars standing on said track; that plaintiff had full knowledge of the fact that cars were constantly being switched on said track and that in attempting to pass between the cars, he was guilty of negligence which was the sole cause of his injury. The defendant also claims as a defense that the plaintiff assumed the risk of the danger which resulted in his injury.

If you believe from a preponderance of the evidence, under the intsructions of the court, that the plaintiff has proved his case as alleged in one or more counts of his declaration, and if it has not been proven that plaintiff assumed the risk as above set forth, then you should find the defendant guilty.

The court instructs you that in this case, the burden of proving that the plaintiff assumed the risk or was guilty of contributory negligence, is upon the defendant.

Given.

While plaintiff must prove his case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrence or things sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constituted a preponderance of the evidence.

Given.

[fol. 235] Neither by these instructions, nor by any words uttered or remark made by the Court during this trial, does or did the Court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole and they must not detach or separate any one instruction from any or either of the others.

Given.

The fact that some of the propositions of law contained in these instructions are repeated in several different instructions is not to be taken by the jury as an intimation by the court that they are more important than others that are stated only once. All the propositions of law in the several instructions are equally entitled to the consideration of the jury, whether they are stated only once or more than once.

Given.

If you believe from the evidence, that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated—if you find it has been corroborated—by other credible evidence or by facts and circumstances proved on the trial.

Given.

[fol. 236] The court instructs the jury that if, after fairly and impartially considering the testimony of all the witnesses in this case and the evidence and the facts and circumstances in evidence before you in this case, you believe

from the evidence that the plaintiff, at the time of and prior to the accident in question, exercised that degree of care for his own safety that an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that you should find the plaintiff was, at and before the happening of the accident in question, in the exercise of ordinary care for his own safety.

Given.

Under the law of this State, the plaintiff is a competent witness to testify in his own behalf in this suit. The jury should not disregard the plaintiff's testimony merely because he is the plaintiff and interested in your verdict, but you should consider his testimony in connection with all the evidence in the case and give his testimony such weight and credit as you believe it entitled to from all the facts and circumstances in evidence.

Given.

If you believe from the evidence under the instructions of the court that at the time and place of the accident and injury complained of by the plaintiff in this case, he was engaged in interstate commerce and was acting in the course of his employment, and if you further believe from the [fol. 237] evidence that the plaintiff's injury, if any, resulted in whole or in part from negligence on the part of the defendant as charged in the plaintiff's declaration or some count thereof, then you should find the defendant guilty, if you further find that he did not assume the risk as herein set forth.

Given.

The jury are instructed that it is provided by an Act of Congress which was in force as the law at the time plaintiff was injured that every common carrier by railroad, while engaging in commerce between any of the several States of the United States, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect

or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. It is further provided that in all actions brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to such employee, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Given.

If you believe from the evidence, under the instructions of the Court, that at the time of the accident and injury complained of by the plaintiff in this case, he was employed by and was at work for the defendants in interstate com- [fol. 238] merce and that he was, then and there, acting within the scope of his employment, and if you further believe from the evidence, under the instructions of the Court, that the defendant was guilty of negligence as charged in the plaintiff's declaration, or some count thereof, then contributory negligence on the part of the plaintiff, if any, will not bar a recovery by the plaintiff but can only be considered in mitigation of damages.

Given.

If you believe from the evidence, under the instructions of the Court, that the defendant was guilty of negligence as charged in the plaintiff's declaration, and if you further believe from the evidence, under the instructions of the Court, that the plaintiff was not guilty of any contributory negligence, and was acting within the scope of his employment, and if you further find from the evidence that the plaintiff has sustained damages by reason of physical pain and suffering undergone by him as a natural, direct and proximate result of negligence of the defendant, as charged in the declaration, and you also believe that the defendant did not assume the risk as above set forth, then to enable the jury to estimate the amount of such damages so caused by physical pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make

such estimate from the facts and circumstances proved by the evidence and by considering them in connection with their knowledge, observation and experience in the affairs of life.

Given.

[fol. 239] The Court instructs the jury that if from the evidence under the instructions of the court, you find the defendant guilty of negligence, as charged in the plaintiff's declaration, or some count thereof, and if you further believe from the evidence that the plaintiff was employed by and was at work for the defendant, at the time of the accident and injury complained of, in interstate commerce, and if you further believe from the evidence, and under the instructions of the Court, that the plaintiff was not guilty of any contributory negligence and was engaged within the scope of his employment and had not assumed the risk, then in assessing the plaintiff's damages, if any, the jury should take into consideration whatever, if anything, the proof may show as to the extent and nature of the injury, if any, suffered by him, if suffered by him as a direct result of the accident in question, so far as shown by the evidence; the pain and suffering, if any, which the jury may believe from the evidence the plaintiff has sustained, as a direct result and consequence of the injury, if any; the duration of such injury, if any, and any permanent disability, if any, caused plaintiff as a direct result and consequence of such injury, if any; also any loss of health or strength, if any, which the jury may believe from the evidence the plaintiff has sustained or will sustain as a direct result and consequence of such injury, if any; also the value of the plaintiff's time lost, if any, by reason of such injury, and his inability, if any, to work and earn money in the future so far as any of the above mentioned elements of damage, if any, have been alleged in the decla-[fol. 240] ration, or some count thereof, and shown by a preponderance of the evidence; and thereby the jury will determine from the evidence what sum will be a fair and just compensation for such injury, if they find a verdict for the plaintiff.

Given.

To the giving of which said instructions, and each and every thereof, and each and every part thereof, the defendant by its counsel then and there duly excepted.

DEFENDANT'S REQUESTED INSTRUCTIONS GIVEN TO JURY.

The court, at the request of the defendant, gave to the jury, on behalf of the defendant, the following instructions:

The court instructs the jury that this suit is brought under the law known as the Federal Employers Liability Act. Under the Act the assumption of the risk of his employment by the defendant is a defense proper to be made by the defendant, and the court instructs you that it is the law that an employee assumes all of the risks and hazards which are obvious and apparent, and which are known to him, and if the jury believe from the evidence that the plaintiff without reasonable excuse attempted to pass between the freight cars in question, and had no duty to perform in or about the said freight cars, or the switch track, then he assumed all of the risk incident to such attempt to pass between said freight cars, which risks he knew of or could have found out by the exercise of ordinary care on his part.

Given.

[fol. 241] If the jury believe from the evidence that the plaintiff was a section-hand in the employ of the defendant, and that he had no duties to perform in, on or about the freight cars or the switch track where the accident occurred, and that the plaintiff was injured while attempting to pass between the freight cars standing on said switch track, solely for his own convenience, and that it was not reasonably necessary for him to pass between said freight cars in order to perform any duties or services in and about his employment by the defendant, the court instructs you that the plaintiff assumed all of the risk in attempting to pass between said freight cars, and that the injuries suffered by him were the result of his own negligence.

Given.

The court instructs the jury that, if they believe from the evidence that the plaintiff was in the employ of the defendant for a long period of time prior to the accident in question, and had his place of abode in a house located on the property of the defendant, adjacent to the switch track where the accident happened, and was familiar with the methods of switching cars in the yards of the defendant; and that the plaintiff had no duties to perform in and about the freight cars or the switch track in question, and that the defendant, by its employees, was conducting switching operations in its yards in which the switch track in question was located, in the usual and ordinary manner, and under the existing conditions known to the plaintiff and that the defendant was guilty of no negligence as charged in the declaration and that the plaintiff was not in the ex- [fol. 242] ercise of due care and caution for his own safety in attempting to pass between said freight cars, and the accident was the result of the plaintiff's own neglect, if you should so find your verdict should be for the defendant.

Given.

The court instructs the jury that, if they believe from the evidence that the plaintiff had for a long time prior to the accident in question, lived in a house belonging to the defendant, adjacent to the switch track in question, and was familiar with the switching operations conducted by the defendant in the yards adjacent to the place of abode of the plaintiff, and that the switching operations were conducted by the employees of the defendant in the ordinary and customary manner at the time of the accident in question; the defendant owed no look-out duty to the plaintiff to ascertain whether or not he was between the cars standing on said switch track, and the accident to the plaintiff was not the result of any negligence on the part of the defendant.

Given.

The court instructs the jury that the plaintiff must prove by a preponderance of the evidence that the injuries complained of were due to and caused by the negligence of the defendant; and if the jury believe from the evidence that

the plaintiff has failed to prove any negligence on the part of the defendant, your verdict should be for the defendant.

Given.

[fol. 243] The court instructs the jury that the right of the plaintiff to recover for the injuries complained of in this case is based on the negligence of defendant; that such negligence is never to be presumed simply because the accident happened but must be affirmatively proved by the plaintiff by a preponderance of the evidence.

Given.

The court instructs the jury that, if they believe from the evidence that there were some freight cars standing on a switch track adjacent to the abode of the plaintiff, and that at the time of the accident the employees of the defendant were engaged in switching cars onto the switch track in question, and that said cars struck and coupled into certain other cars standing on said switch track; and that at that time the plaintiff was attempting to pass between said cars; and if you find that the shifting engine and cars were being operated in the ordinary and customary manner and that there was no negligence on the part of the defendant in the shifting of said engine and cars in the switching operations then your verdict will be for the defendant..

Given.

The court instructs the jury that this suit is brought by the plaintiff under the law known as the Federal Employers Liability Act, in full force and effect prior to and on the 16th day of March, 1926; and that under this Act it is the law that if the plaintiff was not in the exercise of ordinary care and caution for his own safety but was guilty of con-[fol. 244] tributory negligence in attempting to pass between the freight cars standing on the switch track in question, and with knowledge of the fact that switching operations were being conducted on the switch track in question, and that the plaintiff had no duties to perform in and about said freight cars, or said switch track; and if the jury believe that the defendant was guilty of any negligence which tended to bring about the accident and injury to the plaintiff, then under the law the damages which the plaintiff is

entitled to recover, must be diminished to the extent that the plaintiff contributed to the injury by his own negligence, and the jury must take this into consideration in arriving at the amount of its verdict.

Given.

To the giving of which said instructions, and each and every thereof, and each and every part thereof, the plaintiff by his counsel then and there duly excepted.

DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

Counsel for defendant also asked the court to give to the jury the following instructions:

The court instructs the jury that if they believe from the evidence that the plaintiff was not in the exercise of due care and caution for his own safety by reason of his attempting to pass between the freight cars standing on the side track in question and that he had no duties to perform in and about the said freight cars on said side track and if they find that the plaintiff was not required by his duties to be on or about said freight cars, or said switch track, then the injuries sustained by him were due to his own negligence, and the plaintiff cannot recover in this case.

Refused.

[fol. 245] The court instructs the jury that, if they believe from the evidence that the crew of the defendant, in charge of the switching operations, had no knowledge of the presence of the plaintiff, and no reason to anticipate the presence of the plaintiff at the place of injury, then the switching of the cars in question without warning does not constitute negligence on the part of the defendant. If the crew had reason to believe that danger might result to anyone who might be present or that any one without having in mind the plaintiff in particular might be present and in danger then a warning might be required.

Refused.

But the court refused to give said instructions and each thereof to the jury, which action of the court in refusing to give said instruction and each and every part thereof to the jury, the defendant by its counsel then and there duly excepted.

Which were all of the instructions given or refused on the trial of said cause.

VERDICT

And thereupon the jury returned a verdict in favor of the plaintiff, finding the defendant guilty and assessing the plaintiff's damages at the sum of $20,000.

MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME

Thereupon the defendant, by its counsel, entered its motion to set aside the verdict and to grant a new trial.

But the court overruled and denied said motion and refused to set aside said verdict and to grant a new trial in said cause, to which action and ruling of the court in overruling and denying said motion and in refusing to set aside said verdict and to grant a new trial, the defendant, by its counsel, then and there duly excepted.

MOTION IN ARREST OF JUDGMENT AND ORDER OVERRULING SAME

And thereupon the defendant, by its counsel, made a mo-[fol. 246] tion in arrest of judgment; which motion was overruled and denied by the court; to which ruling of the court, the defendant, by its counsel, then and there duly excepted.

ORDER ALLOWING APPEAL

And the court thereupon entered judgment upon the verdict; to which action of the court in entering said judgment the defendant, by its counsel, then and there duly excepted.

Whereupon the defendant, by its counsel, prayed an appeal to the Appellate Court of Illinois, First District, which is allowed upon the filing of bond in the sum of $22,000 in sixty days, and bill of exceptions in sixty days.

ORDER SETTLING BILL OF EXCEPTIONS

And forasmuch as the matters and things hereinbefore set forth do not otherwise appear of record, the defendant tenders this, its bill of exceptions, and prays that the same may be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided; which is accordingly done this 4th day of June, A. D. 1927.

Marcus Kavanagh, Judge of the Superior Court of Cook County. (Seal.)

O. K. Wm. G. Wise, Atty. for Defendant.

Filed June 4, 1927. Samuel E. Erickson, Clerk, per F. A.

[fols. 247 & 248] Clerk's certificates to foregoing papers omitted in printing.

[fol. 249] IN SUPREME COURT OF ILLINOIS

ASSIGNMENT OF ERRORS

And now comes the Chesapeake and Ohio Railway Company, appellant, by William G. Wise, its attorney, and says, that in the record and proceedings, and in rendering the judgment aforesaid, there is manifest error to the prejudice of this appellant, and appellant assigns as such error, the following:

1. The verdict of the jury is against the weight of the evidence.

2. The verdict of the jury is against the law and evidence.

3. The judgment of the court is not legally supported by the evidence.

4. The court erred in refusing at the close of plaintiff's case to instruct the jury to find the defendant, Chesapeake and Ohio Railway Company, not guilty.

5. The court erred in refusing at the close of all the evidence to instruct the jury to find the defendant, Chesapeake and Ohio Railway Company, not guilty.

6. The court erred in admitting improper evidence on behalf of the plaintiff over the objection of the defendant.

7. The court erred in refusing to exclude and strike out, on the motion of the defendant, improper, incompetent and irrelevant and immaterial evidence offered on the part of the plaintiff.

8. The court erred in sustaining objections to competent evidence offered by the defendant.

9. The court erred in giving to the jury improper instructions asked on behalf of the plaintiff.

10. The court erred in refusing to give proper instructions asked for on behalf of the defendant.

11. The court erred in modifying the instructions asked [fol. 250] on behalf of the defendant, and thereafter giving them to the jury.

12. The court erred in denying the motion of the defendant to set aside the verdict of the jury and for a new trial.

13. The court erred in rendering judgment against the defendant for an excessive amount of damages.

14. The court erred in denying the motion of the defendant in arrest of judgment.

15. The court erred in rendering judgment in favor of the plaintiff and against the defendant.

By reason whereof, the appellant, Chesapeake and Ohio Railway Company, prays that said judgment of said Superior Court may be reversed.

The Chesapeake & Ohio Railway Company, Appellant, by William G. Wise, Its Attorney.

[fol. 251] IN SUPREME COURT OF ILLINOIS

ORDER DENYING PETITION FOR CERTIORARI—Oct. 23, 1928

And now on this day the Court having duly considered the petition for a Writ of Certiorari herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of Certiorari herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Springfield, in said State, this 23rd day of November, in the year of our Lord one thousand nine hundred and twenty-eight.

Chas. W. Vail, Clerk of the Supreme Court. (Seal of the Supreme Court, State of Illinois, August 26, 1818.)

[fol. 252] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 619

The Chesapeake and Ohio Railway Company, Petitioner,

vs.

Nick Mihas

Stipulation and Addition to Record—Filed Feb. 13, 1929

It is stipulated and agreed that the attached certified parts of the record, in the above case, in the Appellate Court, in and for the First District of the State of Illinois, and the Supreme Court of the State of Illinois, shall be added to the record in this case on file in the Supreme Court of the United States and that copies thereof be printed or reproduced for distribution to the Court and Counsel along with the record, and shall be considered, to all intents and purposes, a part thereof.

Given under our hands this 31st day of January, 1929.

David H. Peake, William G. Wise, Counsel for the Chesapeake and Ohio Railway Company, Petitioner. John P. Bramhall, of Counsel. Joseph D. Lyon, Counsel for Nick Mihas, Respondent.

At a term of the appellate court begun and held at Chicago, on Tuesday, the fourth day of December, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the First District of the State of Illinois.

Present: Hon. John M. O'Connor, Presiding Justice; William H. McSurely, Justice; David F. Matchett, Justice; William Walter Scott, Clerk; John E. Traeger, Sheriff.

No. 32370

Nick Mihos, Appellee,

vs.

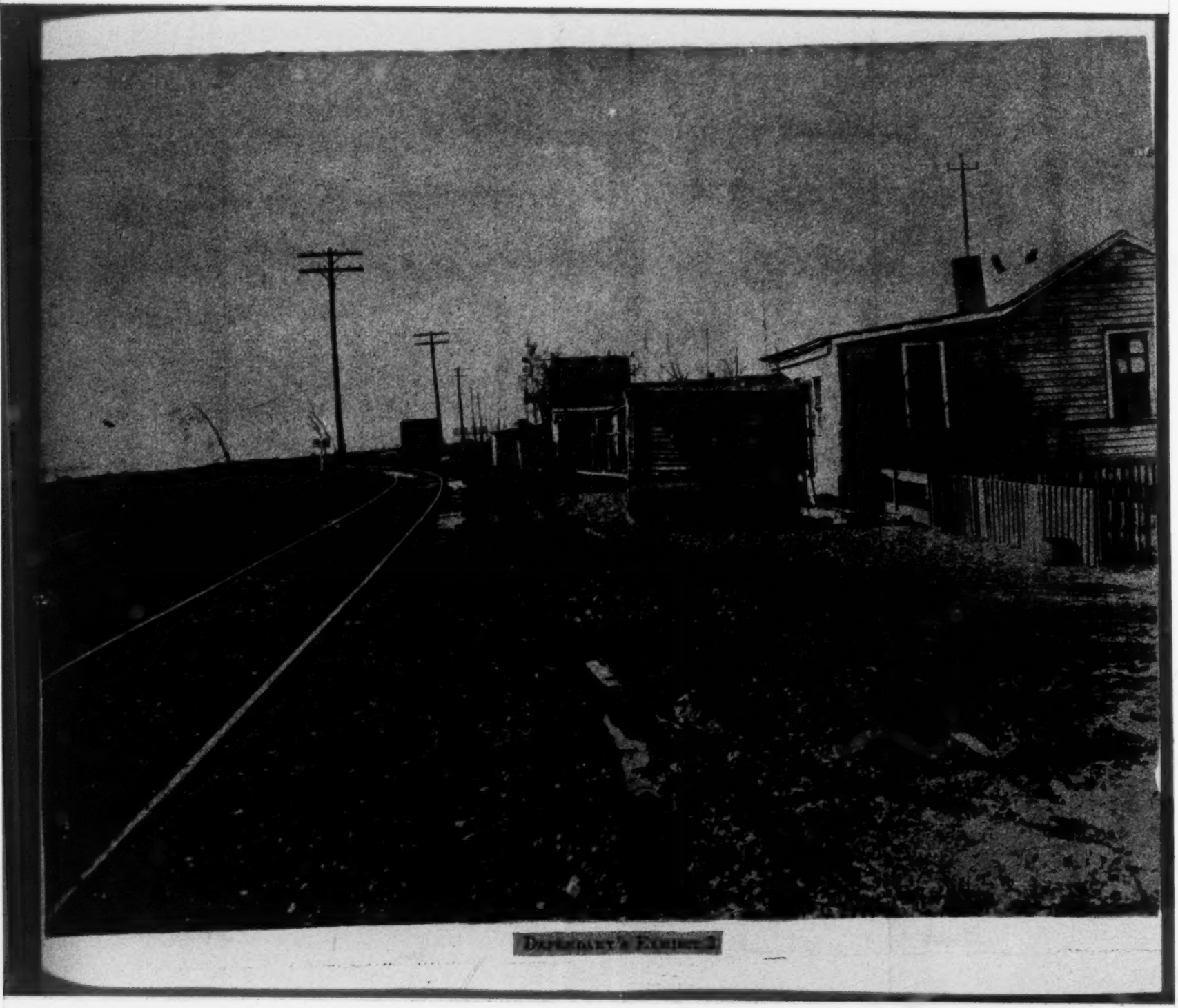
Chesapeake and Ohio Railway Company, Appellant

Appeal from Cook Superior ——

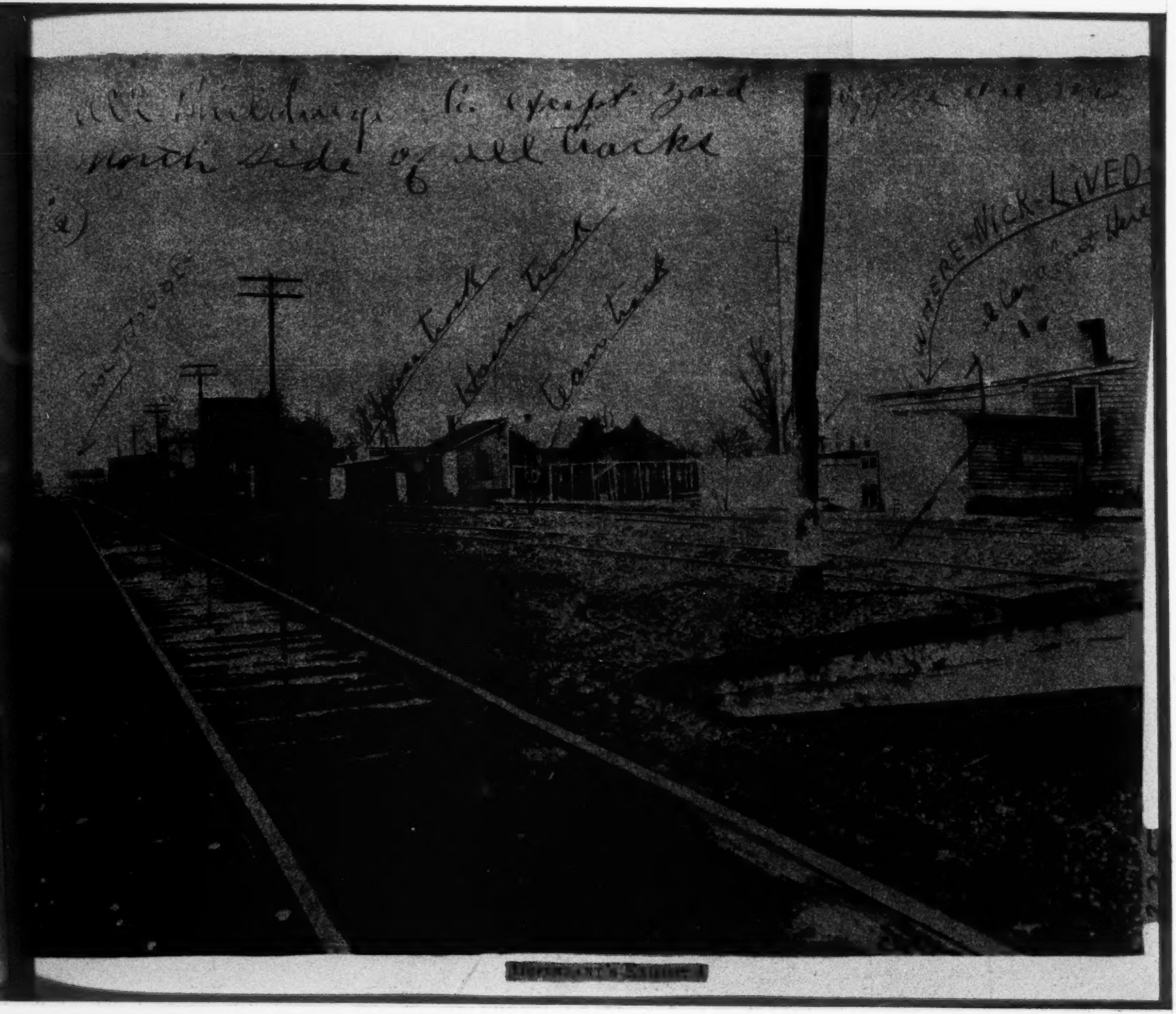
Be it remembered that on the 14th day of September, A. D. 1927, it being one of the days in vacation after the

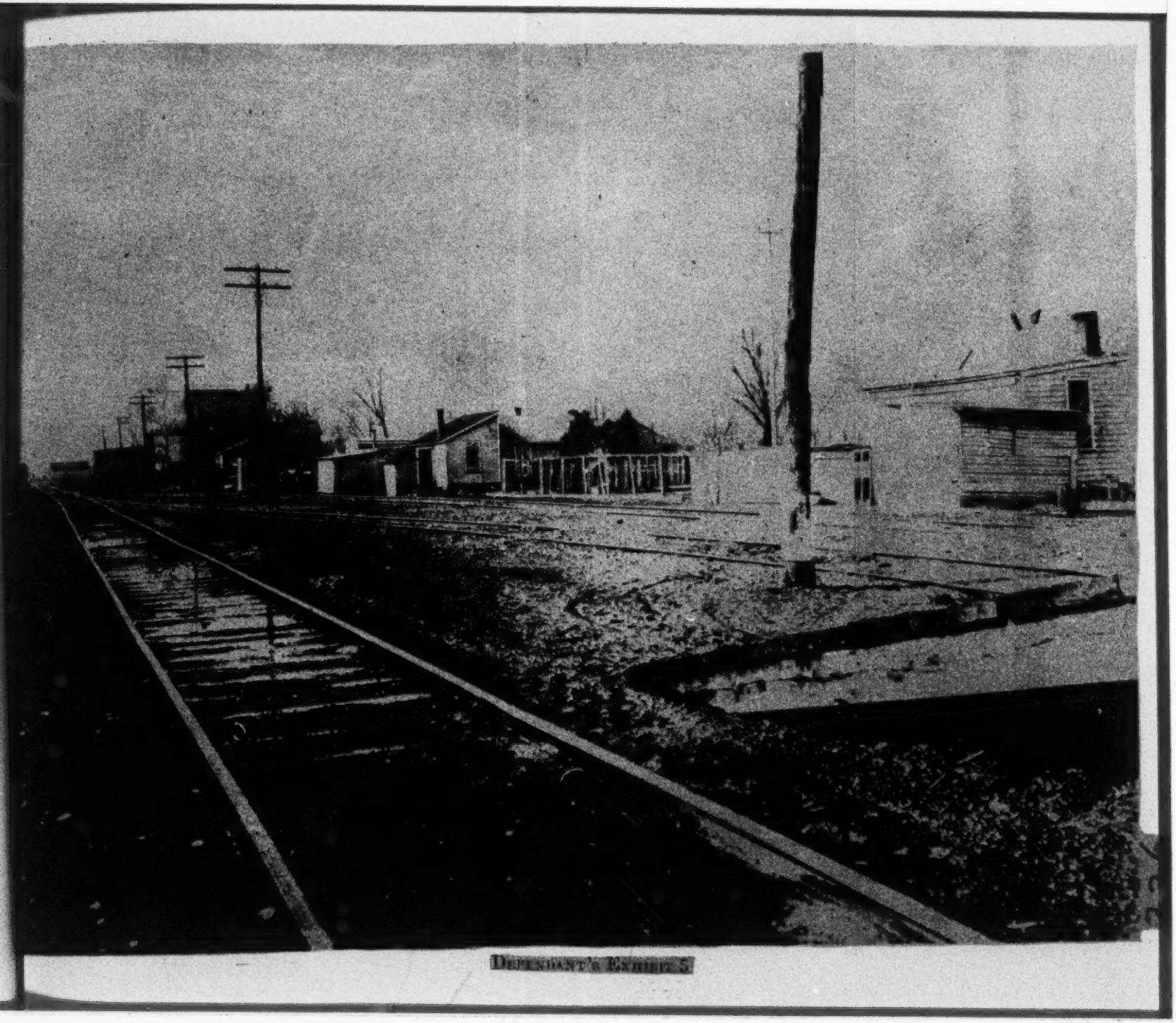
March Term A. D. 1927, there was filed in the office of the Clerk of said Appellate Court, a certain record in the above entitled cause in which record certain exhibits were incorporated, and from which record photographic copies of said exhibits were taken and are hereto attached and marked number 223 with notation on the back as Defendant's exhibit 2, number 224 with notation on back Defendant's exhibit 3, number 225 with notation on back Defendant's exhibit 4, number 226 with notation on back defendant's exhibit 5, number 226 with notation on back defendant's exhibit 6, number 227 with notation on back defendant's exhibit 7 and number 228 with notation on back defendant's exhibit 8.

(Here follow photographs)

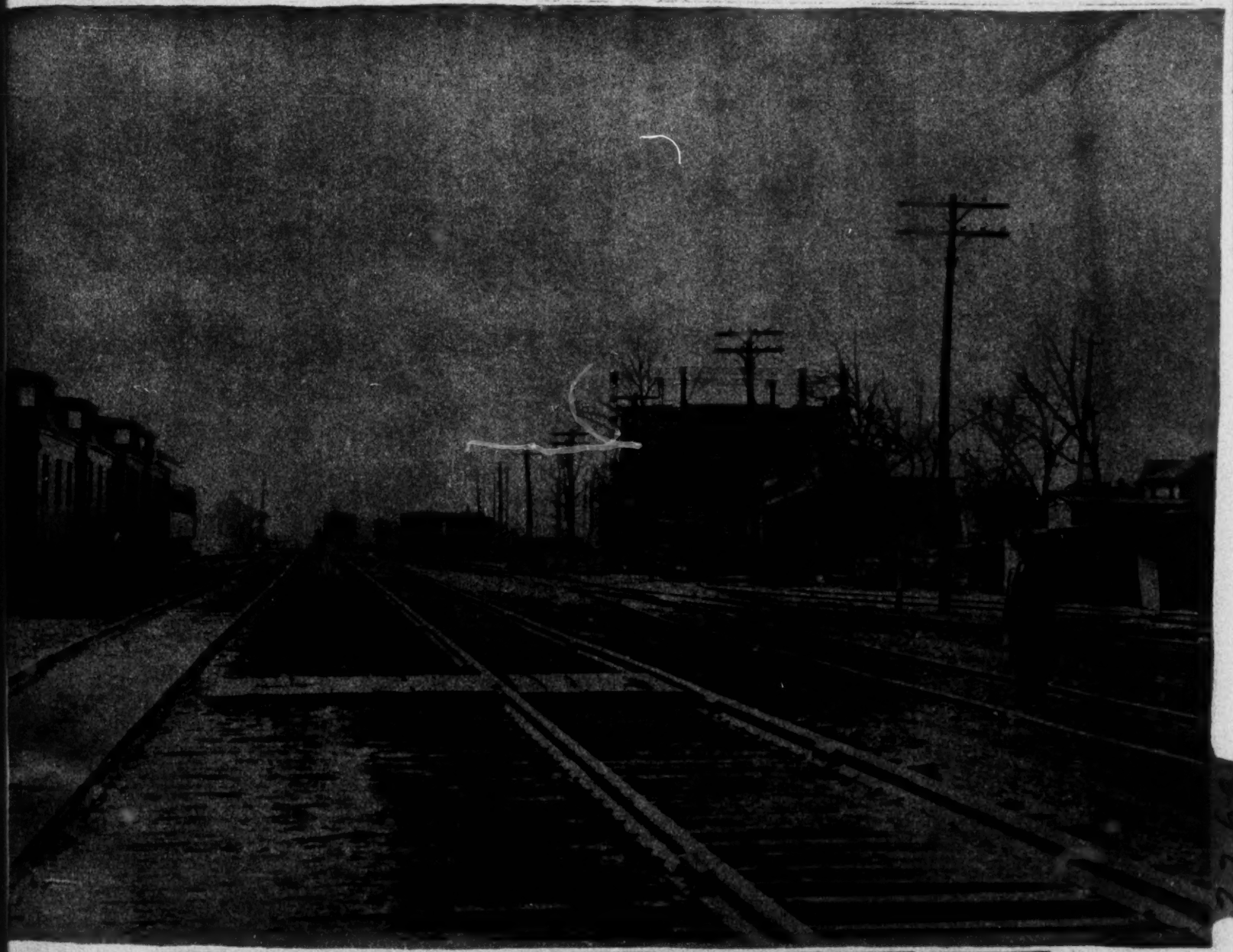


DEFENDANT'S EXHIBIT 3


All buildings lie except Yard
north side of all tracks
a)
Water Tank
Water Tank
Coal Tank
WHERE WICK LIVED



DEFENDANT'S EXHIBIT 5



DEFENDANT'S EXHIBIT 7—Looking South from Canal Street

227

I, William Walter Scott, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, Do Hereby Certify, That the foregoing is a true copy of *of* certain exhibits which were incorporated in the record filed by said appellant in said Appellate Court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 25th day of January in the year of our Lord one thousand nine hundred and Twenty-nine.

William Walter Scott, Clerk of the Appellate Court of the First District, Illinois. (Seal Appellate Court of Illinois, First District.)

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the Appellate Court for the First District, State of Illinois, and/or the Supreme Court of the State of Illinois, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6370)

FILED
JAN 10 1929
CHARLES ELMO...

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1928

No. ~~618~~. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

(33,928)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1928

No. 619

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Now comes THE CHESAPEAKE AND OHIO RAILWAY COMPANY, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Appellate Court of Illinois, First District, and/or to the Supreme Court of Illinois, and to remove therefrom to this Court for review the record in the case lately pending in the Appellate Court entitled: Nick Mihas, appellee, against The Chesapeake and Ohio

Railway Company, appellant, being cause number 32370 on the Docket of the Appellate Court; certiorari denied by the Supreme Court of Illinois on October 23, 1928. (R. 226.)

A duly certified record, including all of the proceedings in the Superior Court of Cook County, Illinois, where the said cause was tried, and in the Appellate Court of Illinois, First District, to which an appeal was taken by petitioner from the judgment of the trial court, and in the Supreme Court of Illinois, in which court a petition for writ of certiorari was filed by the petitioner herein, are filed herewith under separate cover.

Your petitioner represents that it is aggrieved by the final judgment of the Appellate Court of Illinois, First District, and the final order of the Supreme Court of the State of Illinois, entered on the 23rd day of October, 1928, wherein the Supreme Court denied the petition for a writ of certiorari to review the judgment of the Appellate Court; that the matters at issue in the cause are wholly of a Federal nature and are of peculiar gravity and importance, in that the suit was brought to recover damages under the Federal Employers' Liability Act of Congress of April 22, 1908, and Acts amendatory thereof, for injuries to the respondent, Nick Mihas, alleged to have occurred while the said Nick Mihas was in the employ of the petitioner as a section-hand, engaged in interstate commerce, and the several holdings and decisions of the State Courts complained of are believed to be in direct conflict with applicable decisions of this honorable Court upon the questions involved.

Statement of Proceedings.

This action was brought in the Superior Court of Cook County, Illinois, by the respondent, Nick Mihas (sometimes hereinafter called plaintiff), to recover damages for injuries sustained while in the employ of the petitioner (sometimes hereinafter called defendant) as a section-hand engaged in interstate commerce.

At the close of the plaintiff's case in the trial court, and again at the close of all of the evidence offered in the case, defendant made its motions for a directed verdict in its favor, on the ground that the plaintiff had failed to prove any actionable negligence against the defendant, and on the further ground that the plaintiff assumed the risk. The motions were denied and on April 7, 1927, the jury returned a verdict for the plaintiff in the sum of $20,000 (Rec., 47). The defendant made its motion for a new trial, which, on April 16, 1927, was denied. Defendant's motion in arrest of judgment was overruled, and judgment entered by the trial court in the sum of $20,000 (Rec., 48). An appeal was prayed to the Appellate Court of Illinois, First District, and allowed, and thereafter, that court, on the 20th day of June, 1928, affirmed the judgment (Rec., 2). A petition for rehearing was filed in the Appellate Court by petitioner, which was entertained, but on the 5th day of July, 1928, the rehearing was denied (Rec., 2). Thereafter, on the 6th day of September, 1928, a petition for writ of certiorari was filed in the Supreme Court of Illinois by petitioner, which, on the 23rd day of October, 1928, was denied (Rec., 226).

The Supreme Court of Illinois having denied the petition for certiorari, the judgment of the Appellate Court became final.

> Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, 1927 (quoted in Appendix).

Since it was discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on certiorari, and the petition for certiorari was denied, a writ of certiorari from this apparently should be addressed to the Appellate Court of Illinois, First District, and the limit of time for making such application here runs from the date when certiorari was refused by the Supreme Court of Illinois, the highest tribunal in that state in which a decision in this cause can be had, on October 23rd, 1928.

> American Railway Express Company *v.* Levee, 263 U. S., pages 19 and 20.

It should be noted, however, that the accompanying record is certified by the Supreme Court of Illinois.

Specifications of Error.

The judgment in this case has been awarded and affirmed against the petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts in this case, in the following particulars:

1. Error in denying defendant's motion for a directed verdict on the ground that the plaintiffs failed to prove his cause of action for right of recovery under the Act.

2. Error in denying defendant's motion for a directed verdict, made at the close of all of the testimony, on the ground that under all the evidence in the case no negligence on the part of the defendant was proved.

3. Error in denying defendant's motion for a directed verdict for the reason that under the Act the plaintiff assumed all risk of injury to himself in attempting to pass over or between the freight cars, resulting in his injury.

4. Error on the part of the trial court in admitting improper evidence on behalf of the plaintiff over the objections of the defendant, and failure to strike out this evidence on the motion of the defendant.

5. Error on the part of the Appellate Court of Illinois, First District, in affirming the judgment of the trial court, and of the Supreme Court of Illinois in denying defendant's petition for certiorari.

Statement of Facts.

The injury to Mihas occurred on March 16, 1927, at about ten minutes to seven o'clock in the morning, in the defendant's yards at Peru, Indiana (Rec., 95). The tracks in these yards ran in an easterly and westerly direction, bounded on the north by Canal Street and on the south by Wabash River. There were five tracks in the yard, the main track, and switching lead and three house or team tracks. The northerly track was team track number 3, on which the accident occurred. About twenty-five feet north of this team track there was a small house, in which the plaintiff

lived, furnished to him by the company rent free (Rec., 128-130). Mihas had been in the employ of the company for fourteen years, and had lived in the house alongside of the team track for about four years prior to the date of the accident. He used a small speeder car, operated by hand, in going up and down the defendant's line to perform his duties in caring for the switch lamps and lights along the right of way. This speeder car was usually located, as it was on this occasion, in an old box car on the south side of the yards and it was necessary for Mihas to cross the tracks in order to get to it (Rec., 92).

Mihas testified that when he came out of the back door of his house to start to work he looked to one side and the other, did not see or hear any train or shifting cars. He went directly therefrom and, in order to cross the yard to get his speeder car, attempted to climb over a coal car standing with other cars on team track number 3 (Rec. 96), at a point where there was no established crossing, and just at that moment a string of nine cars which had been switched in on the team track struck the standing cars, causing Mihas to fall between the cars (Rec. 97), with the result that his arm was crushed and afterwards amputated.

Mihas obviously could have crossed the tracks at other points without the necessity of climbing over or going between the standing cars, though doubtless not so conveniently (Rec. 117, 118, map opposite p. 128, 128, 129, 146).

This switching operation was effected by what is called a "flying switch"—that is, the engine was cut

loose from the cars after a sufficient momentum had been obtained, then ran along the main track, while the string of cars following were shunted on team track number 3 (Rec. 190-191). Although there was testimony that the impact from the moving car striking those at rest was quite severe (Rec. 70-71) the speed of the cars when shunted was no more than four or five miles per hour, the usual speed for that operation (Rec. 177, 196, 198). Those making the switching movement had no knowledge of the presence or movements of Mihas (Rec. 177, 195). He had no regular time for beginning his work (Rec. 91). It was customary for switching to be done on these tracks at the time of day the injury occurred—a custom with which Mihas was familiar (Rec. 111-112).

Among the cars standing on team track number 3 was a loaded coal car from which some men had been unloading coal shortly prior to the switching movement. There was testimony upon which plaintiff's case was based, admitted over defendant's objection, to the effect that it was customary for trainmen to notify persons unloading freight from the cars liable to be affected when a switching movement of the character made here was contemplated (Rec. 59, 72-73), though it did not appear that the men who had been unloading coal were in any danger at the time of the switching movement here—they had already ceased unloading and were moving away with their truck (Rec. 57, 70, 75, 101, 112, 113). This customary warning was exclusively for persons engaged in unloading cars and not for employes (Rec. 166-167). There was no such notice given in this instance and Mihas,

who had observed these men in the act of leaving, states he heard no such notice given and relied upon that as justifying his course in attempting to climb over the car (Rec. 98-99) though he made no inquiry nor was he otherwise advised as to whether or not these men had been in fact notified or warned (Rec. 113, 116).

Summary of Argument.

The Appellate Court, in its opinion, said (Rec. 10):

> "So far as the public is concerned, and by that we mean people dealing with the defendant in unloading cars at the point in question, we are fully of the opinion that the flying switch, without any warning to those so engaged was a negligent operation. It is urged by counsel for defendant that this may be true, in so far as the public is concerned, but that it owed no duty to the plaintiff and that, even though there may have been a custom to warn teamsters, there was no obligation to warn plaintiff, as he was an employee of the defendant and not entitled to the same warning to which the public was entitled. It is urged that the trial court, in permitting evidence as to this custom was in error. We cannot agree with this contention. * * *."

The judgment of the trial court was sustained mainly, if not solely, on the ground that the custom referred to enured to the benefit of Mihas.

The holdings and decisions complained of are believed to have been erroneous for the following reasons:

(1) *The failure to give Mihas notice or warning of the switchiny movement was not negligence as to him and he assumed the risk thereof* (Aerkfetz *v.* Humphreys, 145 U. S. 418; Toledo, etc., R. Co. *v.* Allen, 45 Sup. Ct. 215);

(2) *The making of the "flying switch" was not negligence as to Mihas* (Toledo, etc., R. Co. *v.* Allen, *supra*), and

(3) *Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not as to him actionable* (St. Louis, etc., R. Co. *v.* Conarty, 238 U. S. 243).

Jurisdiction of This Court.

The controlling question raised by petitioner in the trial court was that, as a matter of law, the evidence is not sufficient to sustain a finding that petitioner's negligence was the proximate cause of the injury complained of; that Mihas assumed the risk and that its motion for a directed verdict should have been granted. The jurisdiction of this court to review the judgment on certiorari seems clear.

Chicago, etc., R. Co. *v.* Coogan, 271 U. S. 472;
Chesapeake, etc., R. Co. *v.* Nixon, 271 U. S. 218.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights and liabilities of the

petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari may be issued under the seal of this court, directed to the Appellate Court of Illinois, First District, and/or to the Supreme Court of the State of Illinois, commanding them and each of them to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, in the within cause (Minneapolis &c., R. Co. *v.* Rock, — U. S. —, No. 454, October term, 1928), to the end that the judgment of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, may be reviewed by this Court as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, may be reversed by this Honorable Court.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
Petitioner.

By DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Since the case presented is admittedly governed by the provisions of the Federal Employers' Liability Act (Rec. 212, 219), "rights and liabilities depend upon it and applicable principles of common law as interpreted and applied in Federal Courts; and negligence is essential to recovery."

New Orleans & N. E. R. Co. *v.* Harris, 247 U. S. 367, 371;
Chicago, M. & St. P. R. Co. *v.* Coogan, 271 U. S. 472.
Toledo, etc., R. Co. *v.* Allen, 48 Sup. Ct. 215.

No recovery should be allowed in this case, upon the facts shown in evidence, for the following reasons:

(1) *The failure to give Mihas notice or warning of the switching movement was not negligence as to him, and he assumed the risk thereof;*

(2) *The making of a "flying switch" was not negligence as to Mihas; and*

(3) *Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not, as to him, actionable.*

(1)

The Failure to give Mihas Notice or Warning of the Switching Movement was not Negligence as to Him, and He Assumed the Risk Thereof.

The plaintiff had been, for a number of years, thoroughly familiar with the manner of the switching

operations in these yards. The employes of the defendant had no reason to anticipate or believe the plaintiff was in or about the cars, or would subject himself to danger in attempting to cross over or between cars. Under these circumstances it was not incumbent upon the defendant to give him notice or warning of the switching movement, and in attempting to pass between the cars under the circumstances, the plaintiff assumed the risk of the danger incident thereto.

In Toledo, etc., R. Co. *v.* Allen, 48 Sup. Ct. 215, *supra*, this court, through Mr. Justice Butler, said, at page 217:

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. Aerkfetz *v.* Humphreys, *supra*.
>
> In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Chesapeake, etc., R. Co. *v.* Nixon, 271 U. S. 218;

Aerkfetz *v.* Humphreys, 145 U. S. 418;

Davis *v.* Phila., etc., R. Co., 276 Fed. 187;
Krysiak *v.* Penn. R. Co., 270 Fed. 758;
Hines, Dir. Gen., *v.* Jasko, 266 Fed. 336;
Connelly *v.* Penn. R. Co., 228 Fed. 322.

(2)

The Making of a "Flying Switch" was not Negligence as to Mihas.

The Appellate Court intimates, rather than decides, that the making of the "flying switch" by the trainmen was a negligent act of which Mihas could complain.

The only relevance of the method of switching concerns the violence of the resulting impact upon the standing cars. If it be conceded that the cars went in on the team track at a speed sufficient to strike the standing cars with more force than was reasonably requisite and that the mere violence of the impact was the proximate cause of the plaintiff's injury, these facts would not of themselves constitute negligence. Mihas was in a place where he had no right to be and his presence there was unknown and unsuspected.

In St. Louis, K. C. & C. R. Co. *v.* Conway, 156 Fed. 234, it was held:

> "An act, which caused an injury to another not foreseen, and which could not reasonably have been anticipated, does not give a right of recovery for such injury on the ground of negligence; and a railroad company cannot be held liable for an injury to a brakeman who was riding on the pilot of the first of two engines coupled together, where he had no right to be, conceding as claimed, that it was caused by the act

> of the engineer of the rear engine in starting his engine suddenly and causing it to jar the one in front; such engineer having no knowledge of the brakeman's position on the pilot."

After discussing the evidence and citing authorities, the court said, on page 239:

> "With such reiteration that the necessity of repeating it almost excites impatience, the courts have asserted, and consistently held, that when the servant, of his own volition and for his own convenience, assumes a dangerous position, not intended by the master, in which to perform his work, he is without just complaint against the master if injury thus come to him."

See also Hinson *v.* Atlantic, etc., R. Co., 172 N. C. 646 (90 S. E. 772).

Nor, in any other respect, is there any warrant for the conclusion that the so-called "flying switch," as made here, was negligent operation as far as the plaintiff was concerned.

> Toledo, St. L. & W. R. Co. *v.* Allen, 48 Sup. Ct. 215, *supra;*
> Lord *v.* Boston, etc., R. Co. (N. H.), 65 Atl. 111.

(3)

Even if There Were a Duty to Give Notice or Warning of the Switching Operation to Those Differently Situated from Mihas, a Breach of That Duty was not as to Him Actionable.

Even if it were true that, under the evidence, there was a duty to the men unloading cars to give notice or

warning to them of the switching operation, which is not believed to be the case, since these men had finished unloading and were leaving the premises (Rec. 57, 70, 75, 101, 112, 113)—under applicable decisions of this honorable court, a breach of that duty resulting in an injury to an employe such as here would not as to him be actionable.

St. L. and San Fran. R. *v.* Conarty, 238 U. S. 243, 249;
Chesapeake and Ohio R. Co. *v.* Nixon, 271 U. S. 218.

The general rule is stated in 39 *C. J.*, page 879, as follows:

> "The general rule as to precautions against known or apparent dangers apply in cases of injuries to servants crossing tracks or yards. Where a servant when crossing a track or yard is not engaged in the performance of any work which demands his attention it is his duty to see and hear approaching trains, and to give his undivided attention to what is taking place about him, and if he is injured by reason of a non-observance of this requirement, he cannot recover. In these circumstances, the servant is held to the same measure of care in looking and listening for approaching trains as any other person lawfully passing over the track. He has no right to rely on a custom to give warnings and signals, given only to those servants actively engaged in the performance of services."

See also

Cincinnati, etc., R. Co. *v.* Swann, 160 Ky. 458 (169 S. W. 886);
Williams *v.* Chicago, etc., R. Co. 135 Ill. 491;
Lord *v.* Boston, etc., R. Co., 65 Atl. 111, *supra.*

The Appellate Court of Illinois, in its opinion apparently announces a doctrine in contravention of this principle and relies upon certain Illinois cases in support of it.

In view of the decisions in the case of Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, *supra* (one of the cases cited in the opinion in the *Conarty case*), it may well be doubted if the Illinois doctrine, in this respect, previously announced, is in anywise different from the Federal rule on the subject. However that may be, it is clear that the Federal rule governs here.

Central Vermont R. Co. *v.* White, 238 U. S. 507;
New Orleans & N. E. R. Co. *v.* Harris, 247 U. S. 367, *supra;*
Chesapeake and Ohio R. Co. *v.* Nixon, 271 U. S. 218, *supra.*

This evidence should not have been admitted, nor should potency have been given it as evidence tending to show negligence.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, should be reversed.

DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

APPENDIX.

Extract from Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, 1927.

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court:" * * *

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 21 ~~649~~.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

JURISDICTION OF THIS COURT.

In the brief for respondent, filed herein, the jurisdiction of this court under section 237 of Judicial Code, as amended by Act of February 13, 1925, is attacked upon the ground that the petitioner did not exhaust its remedy under local law, in that it failed to make application to the Appellate Court for a certificate of importance and an appeal as provided for in subdivision (1) of sec. 121, ch. 110, Cahill's Rev. St. of Ill., 1927. (See appendix to petition.)

Subdivision (2) of that Statute provides that, as to applicable cases—such as here—the Supreme Court may require "any such case to be certified * * * for its review and determination *with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court.*" (Italics supplied.)

The method of review, set out in subdivision (2), is an alternative one giving the "same power and authority" and having "like effect as if it had been carried by appeal or writ of error to the Supreme Court"—obviously including the appeal provided for in subdivision (1). Compare *Rizzo* v. *Catholic Order of Foresters,* 274 Ill. 91, 113 N. E. 104 (construing earlier act). It is clear, therefore, that the cases cited on page 3 of the opposing brief are not pertinent here.

Petitioner is advised that in *Minn. etc. R. Co.* v. *Rock,* —— U. S. ——, No. 454, Oct. Term, 1928, an Illinois case, a writ of certiorari was granted by this court in the face of a jurisdictional attack made upon this very ground.

ASSIGNMENT OF ERRORS IN APPELLATE COURT

It is objected that there was no assignment of errors filed by petitioner in the Appellate Court.

That there was such an assignment, agreeable to state practice, is shown by the judgment of the court (R. 2) and the opinion (R. 5). It is shown in the record (R. 224) though the caption "In the Supreme Court of Illinois" is erroneous, due doubtless to a typographical error. The assignment of errors in the Supreme Court of Illinois appears elsewhere (R. 3). In any event, in

view of the Appellate Court's consideration of the case, this objection is not tenable here.

Campbell v. *Olney,* 262 U. S. 352, 354;
Hartford Life Ins. Co. v. *Johnson,* 249 U. S. 490, 492, 493 (cited in opposing brief, p. 6).

ASSUMPTION OF RISK.

It is argued that the defense of assumption risk is not subject to review here since it was not assigned as error in either the Appellate Court or the Supreme Court.

This is a mistaken view since clearly the assignments in both the Appellate and Supreme Courts below are broad enough to cover that defense (R. 3,224).

That it was made an issue in the case is shown by the instructions (R. 219) and, while the argument for petitioner made in the Appellate Court does not appear in the record, the defense of assumption of risk was pressed in the petition for writ of certiorari presented to the Supreme Court of Illinois. (R. 23-25.)

Furthermore, under the facts here, saying that the employe assumed the risk is but another way of saying the petitioner was not negligent.

Missouri Pac. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Tuttle v. *Detroit, etc. R. Co.,* 122 U. S. 189, 195.
See: 3 Labbatt's Master & Servant (2nd Ed.), p. 3094; also pages 2487-2488.

QUESTIONS OF FACT.

The facts are believed to be fairly stated in the petition.

(1) In so far as respondent's brief undertakes to assert that there was evidence of a custom to notify persons other that those unloading cars of a switching movement such as here, and liable to be affected by it,

the assertion is not believed to be supported by the record. (R. 60, 64, 73, 90, 166, 167.)

And so it was found by the Appellate Court (R. 9)—

> "that it was the uniform custom to *notify persons unloading at this point* whenever the defendant was to run cars in and upon said track." (Italics supplied.)

The point, upon which the case turned in the lower courts, was the conclusion (believed to be erroneous) that this custom enured to the benefit of Mihas, although he was not within the class of persons intended to be protected thereby. (R. 10, 11, 12.)

(2) It is said in the opposing brief that team track No. 3 was "customarily filled with standing cars at the time each morning when respondent was required to go to the place aforesaid to get his speeder car," (Opp. br. p. 8; also p. 11)—the inference being that Mihas customarily crossed over or between cars on this track at a regular time.

But the evidence was that the tracks were not always filled with cars (R. 98) and furthermore that Mihas had no regular time for crossing the tracks in going to his work (R. 91, 119).

(3) It is said that the cars were shunted at an unreasonable and excessive rate of speed and that an ordinary switching movement at a reasonable and proper rate of speed—

> "obviously would not—or at least may not—have thrown respondent between the cars * * * * * *."

(Op. br. p. 10).

It is true the Appellate Court found that the shunted cars "must have proceeded over the track on the team track at a considerable speed so that they struck the standing cars with a great deal more force than was requisite under the circumstances" (R. 10)—but there was no finding that this was the proximate cause of the injury to Mihas nor was liability predicated in anyway thereon.

While there was evidence that the impact of the moving upon the standing cars was quite severe (R. 71, 80) there was also evidence that the cars were shunted in at no greater speed than usual in making a switching movement of that character (R. 177, 196, 198). Nor was there any evidence that the mere violence of the impact was the proximate cause of the injury to Mihas.

At best this is a mere speculation or conjecture which is insufficient. *Chicago, etc. R. Co.* v. *Coogan,* 271 U. S. 472.

But, as pointed out in the brief in support of the petition (p. 13), even admitting otherwise, that fact would not constitute, as to Mihas, negligence of which he could complain.

See, also, *Chicago, etc. R. Co.* v. *Elliott,* 55 Fed. 949, 952, 953.

Respectfully submitted,

DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. [redacted] 21

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

vs.

NICK MIRAS.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner.

DAVID E. LEARY,
WILLIAM G. WIRE,
Counsel for Petitioner.

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249 Illinois Appellate Reports, 446.

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner.

This case is here pending on a writ of certiorari, awarded on the 25th day of February, 1929, to a final judgment of the Appellate Court of Illinois, First District, entered on June 20, 1928 (R. 2); rehearing entertained, but denied, on July 5, 1928 (R. 2); and in which a petition for a writ of certiorari, filed in the Supreme Court of Illinois, September 6, 1928, was denied without opinion, on October 23, 1928 (R. 226).

The petition for a writ of certiorari was filed in this Court on the 10th day of January, 1929.

It was an action based upon the Federal Employer's Liability Act in which there were a verdict and judgment against petitioner (the defendant) in favor of Nick Mihas (the plaintiff) for $20,000 damages.

JURISDICTION

The jurisdiction of this court under Sec. 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 St. 937 (U. S. C. Sec. 344) to review the final judgment of the state court is clear (*Chicago, etc. R. Co.* v. *Coogan*, 271 U. S. 472, 474).

It was argued, however, in opposition to the petition for a writ of certiorari, that petitioner did not exhaust its remedy under the state law, and consequently did not obtain the judgment of the highest court of the state in which a judgment could have been had.

The argument is that petitioner failed to make application to the Appellate Court of Illinois for a certificate of importance and an appeal as provided for in subdivision (1) of Par. 120, Sec. 121, Ch. 110, Cahill's Rev. St. of Ill. 1927 (quoted in appendix), which would have entitled petitioner to have the case reviewed by the Supreme Court of the State, it is said, "as a matter of right," whereas by the method adopted (a petition for a writ of certiorari under subdivision (2) of the act) review by the Supreme Court was gracious or discretionary.

Under the Act, the judgment of the Appellate Court in a case like this is final except that under subdivision (1) the Appellate Court "on petition of parties to the cause" may grant appeals to the Supreme Court in matters deemed by it to be important, by the method therein provided, and under subdivision (2) the Supreme Court may re-

quire, by certiorari or otherwise, "any such case to be certified * * * for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court."

The method of review set out in subdivision (2) is thus an alternative one giving the "same power and authority" and having "like effect as if it had been carried by appeal or writ of error to the Supreme Court."

Compare *La Monte* v. *Kent*, 253 Ill. 230, 97 N. E. 387; *Rizzo* v. *Catholic Order of Foresters*, 274 Ill. 91, 113 N. E. 104 (cases construing earlier act).

While it is doubtless true that the review by the Supreme Court under subdivision (2) is discretionary, in that the writ is not awarded "as a matter of right," yet its power and authority over the cause was the same as if there had been an appeal awarded by the Appellate Court under subdivision (1), and thus, by this proceeding, there was obtained in the cause the judgment of the Supreme Court of Illinois—the highest court of the state in which a judgment could be had.

This view is confirmed by Par. 121, Sec. 122, (quoted in appendix) providing for the re-examination by the Supreme Court of cases "brought to it by appeal or certiorari" as to questions of law only.

The writ of certiorari was awarded here to the Supreme Court of the State and the Appellate Court, in the alternative. Ordinarily it would appear that the writ should be awarded to the Appellate Court—the limit of time for making the application for the writ running from the time the writ of certiorari was refused by the Supreme Court (*American Railway Express Co.* v. *Levee*, 263 U. S. 19)—

but the question as to how the writ should run is doubtful here since the record is certified by the Supreme Court, and this Court is not assisted by any decision of the Supreme Court of the State on the subject. Hence, out of abundant caution, a writ in the alternative was prayed for and allowed.

STATEMENT OF PROCEEDINGS

This action was brought in the Superior Court of Cook County, Illinois, by the respondent, Nick Mihas, to recover damages for injuries sustained while in the employ of petitioner as a section hand, engaged in interstate commerce. It was based upon the Federal Employer's Liability Act (R. 5-6).

At the close of the plaintiff's case in the trial court (R. 125) and again at the conclusion of the taking of the evidence (R. 211) petitioner moved for a directed verdict in its favor, which motion was denied. Petitioner also objected to and moved to exclude certain evidence deemed objectionable, and which will be hereinafter referred to (R. 125). The objection and motion were overruled. The jury, after having been instructed by the court—all of the instructions on behalf of the plaintiff being objected to by the defendant (R. 219)—found a verdict for the plaintiff for $20,000 damages. Motions of the defendant for a new trial and in arrest of judgment being overruled, judgment was rendered for the plaintiff on April 16, 1927 (R. 48). Thereupon an appeal was awarded to the Appellate Court, First District (R. 48).

That court affirmed the judgment on June 20, 1928 (R. 2) for reasons stated in its opinion (R. 5-12).

Thereafter the proceedings were as hereinbefore set out.

SPECIFICATIONS OF ERROR

The judgment in this case has been awarded and affirmed against the petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts in this case, in the following particulars:

1. Error in denying defendant's motion for a directed verdict on the ground that the plaintiff failed to prove his cause of action for right of recovery under the Act.

2. Error in denying defendant's motion for a directed verdict, made at the close of all of the testimony, on the ground that under all the evidence in the case no negligence on the part of the defendant was proved.

3. Error in denying defendant's motion for a directed verdict for the reason that under the Act the plaintiff assumed all risk of injury to himself in attempting to pass over or between the freight cars, resulting in his injury.

4. Error on the part of the trial court in admitting improper evidence on behalf of the plaintiff over the objections of the defendant, and failure to strike out this evidence on the motion of the defendant.

5. Error on the part of the Appellate Court of Illinois, First District, in affirming the judgment of the trial court, and of the Supreme Court of Illinois in denying defendant's petition for certiorari.

STATEMENT OF FACTS

The injury to Mihas occurred on March 16, 1927, at about ten minutes to seven o'clock in the morning, in the defendant's yards at Peru, Indiana (R. 95). The tracks in these yards ran in an easterly and westerly direction, bounded on the north by Canal Street and on the south by Wabash River. There were five tracks in the yard, the main track, and switching lead and three house or team tracks. The northerly track was team track number 3, on which the accident occurred. About twenty-five feet north of this team track there was a small house, in which the plaintiff lived, furnished to him by the company rent free (R. 128-130). Mihas had been in the employ of the company for fourteen years, and had lived in the house alongside of the team track for about four years prior to the date of the accident. He used a small speeder car, operated by hand, in going up and down the defendant's line to perform his duties in caring for the switch lamps and lights along the right of way. This speeder car was usually located, as it was on this occasion, in an old box car on the south side of the yards and it was necessary for Mihas to cross the tracks in order to get to it (R. 92).

Mihas testified that when he came out of the back door of his house to start to work he looked to one side and the other and did not see or hear any train or shifting cars. He went directly therefrom and, in order to cross the yard to get his speeder car, attempted to climb over a coal car standing with other cars on team track number 3 (R. 96), at a point where there was no established crossing, and just at that moment a string of nine cars which had been switched in on the team track struck the standing cars, causing Mihas to fall between the cars (R. 97), with the result that his arm was crushed and afterwards amputated.

Mihas obviously could have crossed the tracks at other points without the necessity of climbing over or going between the standing cars, though doubtless not so conveniently (R. 117, 118, map opposite p. 128, 128, 129, 146).

This switching operation was effected by what is called a "flying switch"—that is, the engine was cut loose from the cars after a sufficient momentum had been obtained, then ran along the main track, while the string of cars following were shunted on team track number 3 (R. 190-191). Although there was testimony that the impact from the moving car striking those at rest was quite severe (R. 70-71) the speed of the cars when shunted was no more than four or five miles per hour, the usual speed for that operation (R. 177, 196, 198). Those making the switching movement had no knowledge of the presence or movements of Mihas (R. 177, 195). He had no regular time for beginning his work (R. 91). It was customary for switching to be done on these tracks at the time of day the injury occurred—a custom with which Mihas was familiar (R. 111-112).

Among the cars standing on team track number 3 was a loaded coal car from which some men had been unloading coal shortly prior to the switching movement. There was testimony upon which plaintiff's case was based, admitted over defendant's objection, to the effect that it was customary for trainmen to notify persons unloading freight from the cars liable to be affected when a switching movement of the character made here was contemplated (R. 59, 72-73), though it did not appear that the men who had been unloading coal were in any danger at the time of the switching movement here—they had already ceased unloading and were moving away with their truck (R. 57, 70, 75, 101, 112, 113). This customary warning was exclusively for persons engaged in unloading cars and not for employes (R. 64, 166-167). There was

no such notice given in this instance and Mihas who had observed these men in the act of leaving, states he heard no such notice given and relied upon that as justifying his course in attempting to climb over the car (R. 98-99) though he made no inquiry nor was he otherwise advised as to whether or not these men had been in fact notified or warned (R. 113, 116).

OPINION OF THE APPELLATE COURT

The Appellate Court, in the course of its opinion (R. 5-12), said (R. 10):

> "So far as the public is concerned, and by that we mean people dealing with the defendant in unloading cars at the point in question, we are fully of the opinion that the flying switch, without any warning to those so engaged was a negligent operation. It is urged by counsel for defendant that this may be true, in so far as the public is concerned, but that it owed no duty to the plaintiff and that, even though there may have been a custom to warn teamsters, there was no obligation to warn plaintiff, as he was an employee of the defendant and not entitled to the same warning to which the public was entitled. It is urged that the trial court, in permitting evidence as to this custom was in error. We cannot agree with this contention. * * *."

After citing certain Illinois cases in support of its conclusions, the court continued (R. 12):

> "We have examined the cases cited by counsel in support of their contention, but are of the opinion that the general rule in this state, seems to be that an employee is entitled to consider the rules and customs of his employer in governing his conduct while upon his employer's premises and has a right to rely upon

the observance of such rule or custom by his employer as well as the general public would have such a right, and that the jury had a right to consider the fact that there was such a custom in force in the yards of the defendant company, where the accident occurred, in arriving at the questions as to whether or not the plaintiff, at the time of the accident was, himself, in the exercise of due care for his own safety."

It is thus seen that the judgment of the trial court was sustained mainly, if not solely, upon the ground that the custom referred to enured to the benefit of Mihas.

SUMMARY OF ARGUMENT

The holdings and decisions complained of are believed to have been erroneous for the folowing reasons:

(1) The failure to give Mihas notice or warning of the switching movement was not negligence as to him and he assumed the risk thereof (*Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Toledo, etc. R. Co.* v. *Allen*, 48 Sup. Ct. 215);

(2) The making of the "flying switch" was not negligence as to Mihas (*Toledo, etc. R. Co.* v. *Allen, supra*); and

(3) Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not as to him actionable (*St. Louis, etc. R. R.* v. *Conarty*, 238 U. S. 243; *Chesapeake and Ohio R. Co.* v. *Nixon*, 271 U. S. 218).

ARGUMENT

(1)

The failure to give Mihas notice or warning of the switching movement was not negligence as to him, and he assumed the risk thereof.

The plaintiff had been, for a number of years, thoroughly familiar with the manner of the switching operations in these yards (R. 111-112). The employes of the defendant had no reason to anticipate or believe the plaintiff was in or about the cars, or would subject himself to danger in attempting to cross over or between cars (R. 177, 193). Under these circumstances it was not incumbent upon the defendant to give him notice or warning of the switching movement, and in attempting to pass between the cars under the circumstances, the plaintiff assumed the risk of the danger incident thereto.

In *Toledo, etc. R. Co.* v. *Allen,* 48 Sup. Ct. 215, *supra,* this court, through Mr. Justice Butler, said, at page 217:

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz* v. *Humphreys, supra.*
>
> "In any event plaintiff assumed the risk. He was

familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Chesapeake, etc. R. Co. v. *Nixon,* 271 U. S. 218;
Aerkfetz v. *Humphreys,* 145 U. S. 418;
Davis v. *Phila., etc. R. Co.,* 276 Fed. 187;
Hines, Dir. Gen. v. *Jasko,* 266 Fed. 336;
Connelley v. *Penn. R. Co.,* 228 Fed. 322.

It was argued in opposition to the petition that the defense of assumption risk is not subject to review here since it was not assigned as error in either the Appellate Court or the Supreme Court.

This is a mistaken view since clearly the assignments in both the Appellate and Supreme Courts below are broad enough to cover that defense. (R. 3, 224.)

That it was made an issue in the case is shown by the instructions (R. 219) and, while the argument for petitioner made in the Appellate Court does not appear in the record, the defense of assumption of risk was pressed in the petition for writ of certiorari presented to the Supreme Court of Illinois. (R. 23-25.)

Furthermore, under the facts here, saying that the employe assumed the risk is but another way of saying the petitioner was not negligent.

Missouri Pac. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Tuttle v. *Detroit, etc. R. Co.,* 122 U. S. 189, 195.
See: 3 Labatt's Master & Servant (2nd Ed.), p. 3094; also pages 2487-2488.

And the same result is brought about by considering the plaintiff's act as negligence which, under the facts here, may be considered "as the sole and direct cause of

the accident." *Atlantic Coast Line R. R.* v. *Davis*, —— U. S. ——, No. 70, October Term, 1928, decided February 18, 1929.

(2)

The making of a "Flying Switch" was not negligence as to Mihas.

The Appellate Court intimates, rather than decides, that the making of the "flying switch" by the trainmen was a negligent act of which Mihas could complain.

No notice or warning of the switching movement being required, the only relevance of the method of switching concerns the violence of the resulting impact upon the standing cars. It is true the Appellate Court found that the shunted cars "must have proceeded over the track on the team track at a considerable speed so that they struck the standing cars with a great deal more force than was requisite under the circumstances" (R. 10)—but there was no finding that this was the proximate cause of the injury to Mihas nor was liability predicated in anyway thereon.

While there was evidence that the impact of the moving upon the standing cars was severe enough to drive the standing cars forward a distance of three or four car lengths (R. 71, 80) there was also evidence that the cars were shunted in at a speed of four or five miles an hour—the usual speed in making a switching movement of that character (R. 177, 196, 198). There was no evidence that the mere added violence of the impact was the proximate cause of the injury to Mihas. At best this is a mere speculation or conjecture which is insufficient. *Chicago, etc. R. Co.* v. *Coogan*, 271 U. S. 472.

If it be conceded, however, that the cars went in on the team track at a speed sufficient to strike the standing cars

with more force than was reasonably requisite and that the mere added violence of the impact thus occasioned was the proximate cause of the plaintiff's injury, these facts would not of themselves constitute negligence. Mihas was in a place where he had no right to be and his presence there was unknown and unsuspected.

In *St. Louis, K. C. & C. R. Co.* v. *Conway,* 156 Fed. 234 (C. C. A. 8th), it was held (quoting from syllabus):

> "An act, which caused an injury to another not foreseen, and which could not reasonably have been anticipated, does not give a right of recovery for such injury on the ground of negligence; and a railroad company cannot be held liable for an injury to a brakeman who was riding on the pilot of the first of two engines coupled together, where he had no right to be, conceding as claimed, that it was caused by the act of the engineer of the rear engine in starting his engine suddenly and causing it to jar the one in front; such engineer having no knowledge of the brakeman's position on the pilot."

After discussing the evidence and citing authorities, the court said, on page 239:

> "With such reiteration that the necessity of repeating it almost excites impatience, the courts have asserted, and consistently held, that when the servant, of his own volition and for his own convenience, assumes a dangerous position, not intended by the master, in which to perform his work, he is without just complaint against the master if injury thus come to him."

See *Gulf, etc. R. R.* v. *Wells,* 275 U. S. 455, 459.

See also *Hinson* v. *Atlantic, etc. R. Co.,* 172 N. C. 646, 90 S. E. 772.

Nor, in any other respect, is there any warrant for the

conclusion that the so-called "flying switch," as made here, was a negligent operation as far as the plaintiff was concerned.

Toledo, St. L. & W. R. Co. v. *Allen,* 48 Sup. Ct. 215, *supra;*

Lord v. *Boston, etc. R. Co.* (N. H.), 65 Atl. 111.

(3)

Even if there were a duty to give notice or warning of the switching operation to those differently situated from Mihas, a breach of that duty was not as to him actionable.

The Appellate Court stated in its opinion (R. 9) that the evidence showed:

> "* * * it was the uniform custom to notify persons unloading at this point whenever the defendant was about to run cars in and upon said track."

The point upon which the case turned in the lower courts was that this custom enured to the benefit of Mihas, although he was not within the class of persons intended to be protected thereby (R. 10, 11, 12).

Even if it were true that, under the evidence, there was a duty to the men unloading cars to give notice or warning to them of the switching operation, which is not believed to be the case, since these men had finished unloading and were leaving the premises (R. 57, 70, 75, 101, 112, 113)—under applicable decisions of this honorable court, a breach of that duty resulting in an injury to an employe such as here would not as to him be actionable.

St. L. and San Fran. R. R. v. *Conarty,* 238 U. S. 243, 249;

Chesapeake and Ohio R. Co. v. *Nixon,* 271 U. S. 218, 220;

The Eugene F. Moran, 212 U. S. 466, 476.
See also: *Cincinnati, etc. R. Co.* v. *Swann*, 160 Ky. 458, 169 S. W. 886;
Williams v. *Chicago, etc. R. Co.*, 135 Ill. 491;
Lord v. *Boston, etc. R. Co.*, 65 Atl. 111, *supra*.

The Appellate Court of Illinois, in its opinion, apparently announces a doctrine in contravention of this principle and relies upon certain Illinois cases in support of it.

In view of the decision in the case of *Williams* v. *Chicago, etc. R. Co.*, 135 Ill. 491, *supra* (one of the cases cited in the opinion in the *Conarty case*), it may well be doubted if the Illinois doctrine, in this respect, previously announced, was in anywise different from the Federal rule on the subject. However that may be, it is clear that the Federal rule governs here.

Central Vermont R. Co. v. *White*, 238 U. S. 507;
New Orleans & N. E. R. Co. v. *Harris*, 247 U. S. 367;
The Western Atlantic R. Co. v. *Hughes*, —— U. S. ——, No. 234, October Term, 1928, decided Feb. 18, 1929.

The challenged evidence should not have been admitted, nor should potency have been given it as evidence tending to show negligence.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, should be reversed.

DAVID H. LEAKE,
WILLIAM G. WISE,
Counsel for Petitioner.

APPENDIX

Paragraphs 120 and 121, Sections 121 and 122, Chapter 110, Cahill's Revised Statutes of Illinois, 1927.

"¶ 120. Appeal from Appellate to Supreme Court—Final judgment.] § 121. In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: And, provided, also that application under this Act to the Supreme Court to cause it to require a case to be certified to it for its review and determination shall be made on or before twenty (20) days before the first day of the succeding term of said Supreme Court:

Provided, fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist.

"Whenever judgment has been rendered in any of the said Appellate Courts, the Appellate Court so rendering judgment shall have power to stay the issuing of any mandate until the time for filing a petition in the Supreme Court for a writ of certiorari shall have expired without any such petition having been filed, or if such petition for said writ shall have been filed within the proper time, the Appellate Court so rendering judgment shall have power to stay the issuing of any mandate until said writ of certiorari shall have been granted or refused. Whenever said writ of certiorari shall have been granted, the issuing or enforcement of any mandate of the Appellate Court pursuant to its judgment, or of any judgment entered in any court or standing affirmed in any court pursuant to the mandate of the Appellate Court, shall be stayed without further order by the Supreme Court, until the final disposition of the case by the Supreme Court."

"¶ 121. Supreme Court—To pass only on law—Exceptions.] § 122. The Supreme Court shall re-examine cases brought to it by appeal or writ of certiorari as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or appellate courts upon controverted questions of fact therein."

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner.

vs.

NICK MIHAS,
Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

JOHN P BRAMHALL, JOSEPH D. RYAN,
Counsel for Respondent.
Of Counsel.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

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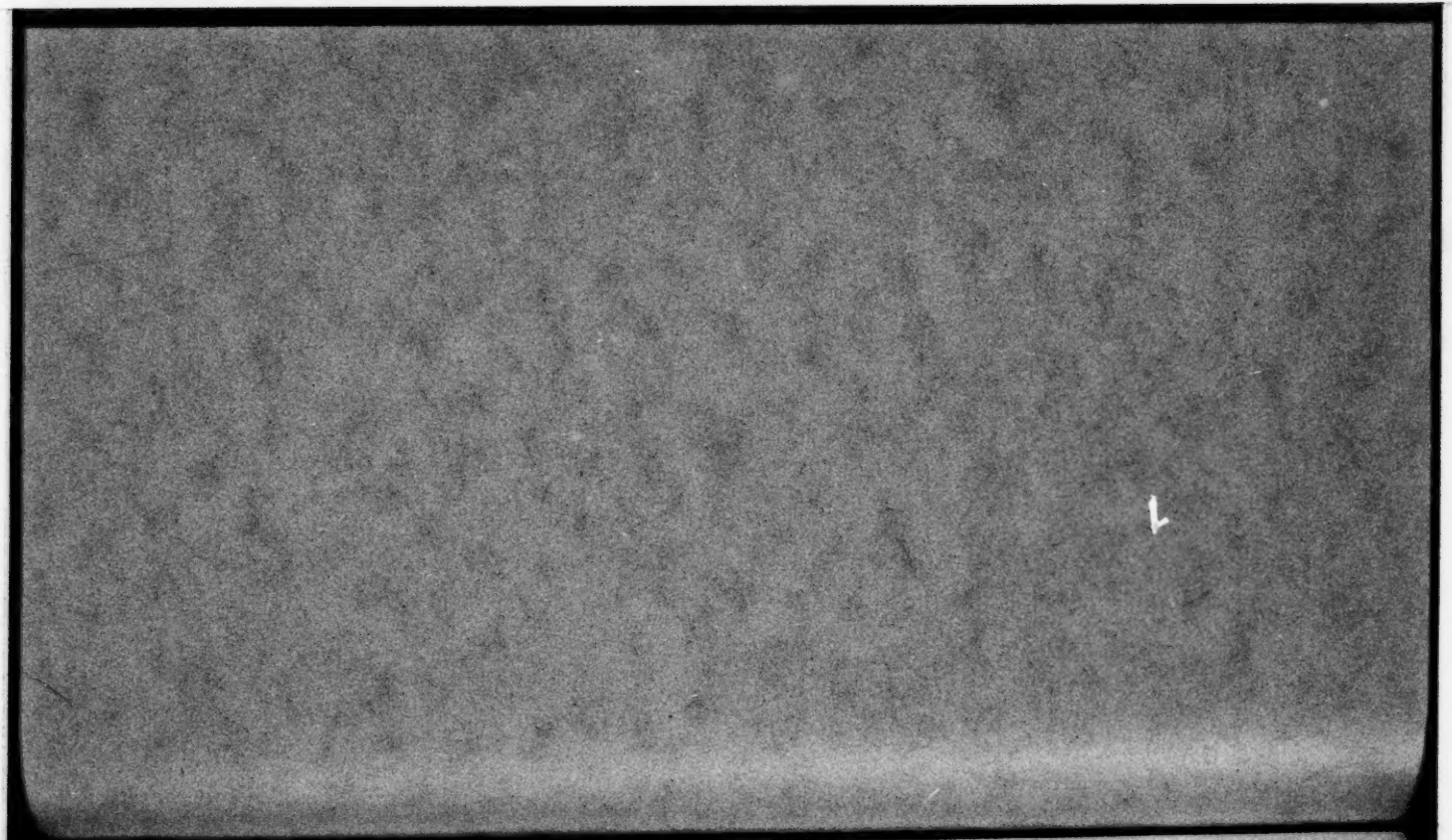

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

vs.

NICK MIHAS,

Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

I.

JURISDICTION OF THIS COURT.

This petition for writ of certiorari should be dismissed for want of jurisdiction.

(A) While a petition for writ of certiorari was filed in the Supreme Court of Illinois by petitioner which was denied (Rec. 226), the record in this case discloses that no certificate of importance was asked for or denied in the Appellate Court of Illinois. Had petitioner asked for a certificate of importance and had the Appellate Court of Illinois granted such certificate, the case could have been taken, as a matter of right, to the Supreme Court of Illinois, the highest court of the State, and that court would have been required to take the case, review it, and pass judgment upon it.

The Statute of Illinois (Sec. 121, Chapter 110 Cahill's Revised Statutes of Illinois, 1927) provides that in case a majority of the judges of the Appellate Court, in a case decided by them, involves a question of such importance that it should be passed on by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal (Appendix p. 20).

It appears from the foregoing that petitioner did not, in accordance with the United States statutes (See Judicial Code), exhaust all the remedies at hand for obtaining "a final judgment or decree * * * in the highest Court * * * in which a decision in the suit could be had * * *."

Petitioner having failed to ask for a certificate of importance in the Appellate Court of Illinois, the granting of which would have required the Supreme Court of Illinois to take the case and consider the errors assigned —if any were assigned—in the Appellate Court, it becomes apparent that petitioner failed to comply with the United States statutes and did not exhaust in the State Court the means at hand for obtaining a final judgment in the highest court of the State and this court is, therefore, without jurisdiction to entertain this petition.

Gregory v. *McVeigh*, 23 Wall. 294.
Stratton v. *Stratton*, 239 U. S. 55.

The denial of petitioner's petition for writ of certiorari by the highest court of the State of Illinois is not such a judgment of such court as may be reviewed by the Supreme Court of the United States by writ of certiorari,

since petitioner failed to make application to the Appellate Court for a certificate of importance which, if granted, entitled petitioner to an appeal to the Supreme Court of Illinois "as a matter of right."

McMaster, et al. v. *Gould, et al.*, 72 L. ed. (U. S. Sup. Ct. Advance Opinions, Mar. 15, 1928), p. 337.

Matthews v. *Huwe*, 269 U. S. 262,

Fisher v. *Perkins*, 122 U. S. 522.

It will be observed that in the *McMaster* case, 72 L. ed., p. 337, *supra*, under the New York Practice Act, an appeal to the Court of Appeals, which does not lie as a matter of right, may be taken where the Appellate Court certifies that a question of law is involved which ought to be reviewed, or where, in case of its refusal so to certify, an appeal is allowed by the Court of Appeals. When an appeal, which is not a matter of right, is taken without leave, it must be dismissed, notwithstanding that leave to appeal in the first instance is discretionary with both courts.

The fact that under the Illinois practice, petitioner had the right to and did apply for a writ of certiorari to the Supreme Court of Illinois without applying for a certificate of importance in the Appellate Court does not alter the situation, since the refusal of the Supreme Court to grant such writ was discretionary with that court. This is conceded by petitioner (Petition, page 4). While the limit of time for making application in this court for petition for certiorari runs from the date when certiorari was denied by the Supreme Court of Illinois (*American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 20), nevertheless that court never took the case for review or determination or passed upon its merits.

Obviously petitioner, in the instant case, did not exhaust all the remedies or means at hand for obtaining a final judgment or decree by the highest court of the State of Illinois. No final judgment or decree has been entered in the Supreme Court of Illinois, and the petitioner's application for a writ of certiorari to this (United States Supreme Court) if granted, must be directed to the Appellate Court of Illinois (also conceded by petitioner—Petition, p. 4), which court had before it the entire record of proceedings and wherein the final judgment or decree in this case was entered.

The effect of the denial of a petition for writ of certiorari has often been declared by the Supreme Court of the United States.

In the case of *U. S.* v. *Carver*, 260 U. S. 482, it is said:

> "The denial of a writ of certiorari imports no expression of opinion on the merits of the case."

We submit that the ruling in the *McMaster* case, *supra*, is decisive of this case, as no final judgment or decree "was ever entered in the highest court" of the State of Illinois. Such judgment might have been obtained if petitioner had applied for and been granted a certificate of importance in the Appellate Court of Illinois.

The Appellate Courts of Illinois frequently grant certificates of importance upon application therefor.

Wilcox v. *Bird*, 330 Ill. 571-575.

Reivitz v. *Chicago Rapid Transit Co.*, 327 Ill. 207, 208.

McKee v. *Trisler*, 311 Ill. 537, 538.

Rubin v. *Strandberg*, 288 Ill. 64, 65.

G. W. Oil Co. v. *C. M. & St. P. Ry. Co.*, 275 Ill. 56, 57.

Sherwin v. *City of Aurora*, 257 Ill. 458.

(B) The record fails to disclose any assignment of errors in the Appellate Court of Illinois.

The Appellate Court of Illinois, by its judgment affirmed the judgment of the trial court, and it is to said Appellate Court that the writ of certiorari here applied for must be directed, if granted.

An assignment of errors in the Appellate Court of Illinois performs the same office as the declaration in the trial court.

Ditch v. *Sennott*, 116 Ill. 290.

McAllister & Schroeder v. *Weber Motor Car Co.*, 243 Ill. App. 530.

Butters v. *C. B. & Q. R. Co.*, 154 Ill. App. 275.

In the case of *Voges* v. *Davison*, 306 Ill. 357, the court said:

> "Various alleged errors are argued by plaintiff in error but no errors have been assigned on the record. There is, therefore, no issue for this court to try. The rule requiring that the assignment of errors must be written upon or attached to the record has been in force since the organization of this court, and this court has repeatedly held that a failure to assign errors requires a dismissal. *Ditch* v. *Sennott*, 116 Ill. 288; *Benneson* v. *Savage*, 119 *id.* 135; *McCormick* v. *Chicago and State Line Railway Co.*, 219 *id.* 593."

A rule identical with that laid down in the Illinois Supreme Court, making an assignment of errors an essential requisite to a review by that court, obtains in the Appellate Court of Illinois and has likewise been in force since the establishment of that court. *McAllister &*

Schroeder v. *Weber Motor Car Co.*, 243 Ill. App. 530, *supra*.

The failure of the record filed herein to disclose an assignment of errors in the Appellate Court of Illinois, deprives this court of jurisdiction to grant the writ applied for.

In the case of *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, at p. 536, the court said:

> "While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review. *Baldwin* v. *Kansas*, 129 U. S. 52; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and therefore for want of jurisdiction, the writ of error is dismissed."

In *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 492, 493, this court held:

> "The jurisdiction of this court to review the final judgment or decree of the highest court of a State, in such a case, as we have here, is defined in Sec. 237 of the Judicial Code, as amended * * *. It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, * * * and upon the question whether or not such a claim has been so asserted the decision of the State Court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.'

Atlantic Coast Line R. R. Co. v. *Mims*, 242 U. S. 532, 535; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 371, and cases cited."

To the same effect are:

Olympia Mining Co. v. *Kerns*, 236 U. S. 211.

Chesapeake & O. Ry. Co. v. *McDonald*, 214 U. S. 191.

Mellon v. *O'Neil*, 275 U. S. 212.

II.

If this court should decide that it has jurisdiction to entertain this petition, there is but one question to determine, viz., whether petitioner was guilty of negligence, as charged by respondent.

Petitioner's first specification of error in this court raises the naked legal question whether there is any evidence in the whole record which, from its reasonable intendments and inferences, fairly tended to make out respondent's case.

STATEMENT OF FACTS.

Respondent lived in a house on petitioner's premises just south of Canal street, an east and west street, and a short distance west of Cass street, in Peru, Indiana. He was required to live there and was subject to call at all hours (Rec. 89, 90).

It was necessary for him to pass over 5 tracks in petitioner's yard to get to his speeder, which was kept in a shanty or linemen's shop on the opposite side of the yard. He used this speeder in going from place to place over petitioner's lines.

The team track on which the accident happened was but a short distance south of respondent's house and was the first track to be encountered as he crossed the petitioner's premises to go to the linemen's shanty aforesaid. This track was customarily filled with standing cars at the time each morning when respondent was required to go to the place aforesaid to get his speeder (Rec. 98).

At the time of the accident, there was a long line of standing cars extending both to the east and the west of this house (Rec. 56, 70, 96). A coal car directly opposite his house was being unloaded and the men engaged therein had just started away from the side of this car with a load of coal at the time respondent attempted to cross over or between the standing cars (Rec. 57, 70, 113). Respondent had to do one of three things to get to the linemen's shanty where his speeder was kept. He could have left petitioner's premises, walked east 1,000 feet and crossed the tracks at Broadway, which would necessitate his walking back

the same distance alongside of or between these tracks (Rec. 148). He could have gone to the west several hundred feet to a point beyond the cars standing on the team and house tracks, but he would then be obliged to cross the tracks at a place where cars were liable to be switched onto the house tracks, where his view to the west would be obstructed by cars on the spur track (See petitioner's plat, Rec. 128; and photographs, Supp. Rec.). The third way to get to his speeder would be to cross over or between the cars and the team track, the course he pursued at the time of the accident and which he had been doing for a period of five years with the knowledge and consent of his boss or foreman (Rec. 99).

Before attempting to cross over or between the standing cars on the team track, he looked carefully both to the east and the west, but saw no cars in motion and received no warning or notice of any kind that cars were to be switched or "dropped" in on this team track (Rec. 97). It had been the uniform practice and custom of petitioner to notify all persons who were in or about the cars standing on this team track or engaged in loading or unloading any of them, when cars on this track were to be moved or when other cars were to be operated or propelled against them (Rec. 59, 60, 98, 99).

Petitioner propelled 9 cars, some of which were loaded, from a point more than 1,000 feet distant (See plat, Rec. 128 and Rec. 153), upon and against the cars standing on the team track with sufficient force and violence to move the whole string of standing cars 3 or 4 car lengths and to send coal "flying all over there" (Rec. 71, 80).

This movement was made not only in violation of the established practice and custom to give warning to all

persons engaged at work in or about the cars, but at an excessive rate of speed as well (Rec. 71, 73).

The ordinary switching movement at a reasonable and proper rate of speed, even if no warning had been given, obviously would not—or at least may not—have thrown respondent between the cars while he was crossing over or between them in the customary manner.

In the case of *Ill. Cent. R. R. Co.* v. *Skaggs*, 240 U. S. 66, at p. 69 of the opinion, it is said by the court:

> "It is contended that the State Court erred in permitting a recovery under the federal statute, for the reason that the injury resulted from Skagg's own act or from an act in which he participated. The company, it is said 'can not be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or by reason of any defect or insufficiency due to its negligence in its property or equipment, April 22, 1908, 35 Stat. 65. But on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.
>
> "The inquiry must be whether there is neglect on the part of the employing carrier and if the injury to one employee resulted 'in whole or in part,' from the negligence of any of its other employees, it is liable under the express terms of the act."

The Appellate Court in its opinion found the following facts:

(1) That at the time respondent attempted to cross over or between the cars opposite to his house, there was a string of cars extending both to the east and west a distance of four or five hundred feet.

(2) That it became necessary for respondent, in the due course of his employment, to cross the tracks at this place.

(3) That he customarily did so each morning.

(4) That petitioner, having provided a habitation for respondent on its premises, it would be quite illogical to say that he would be required to leave those premises in order to again return to them for the purpose of obtaining his car.

(5) That it was customary for petitioner, when setting cars upon this team track, to send someone ahead in order to notify teamsters that cars were to be placed upon said track, in order that they might guard themselves against danger arising from the cars coming in contact with those standing on said track.

(6) That respondent had a right to rely upon the observance of this custom.

(7) That the standing cars in question were struck with unusual and unnecessary violence.

(8) That on the morning in question the unloading of the coal car had commenced at 6 o'clock.

(9) That men had been engaged at work in and about this car unloading coal therefrom onto a truck which had just started and which had reached a point but 30 or 40 feet from the place where it had been loaded when the crash occurred.

(10) That there was no notice given to anyone by petitioner that cars were to be placed on this track, contrary to its usual custom of sending someone ahead to warn persons lawfully in or about the cars.

(11) That respondent was not guilty of contributory negligence in assuming that petitioner would give the customary warning on the morning of the accident.

(12) That the cars which struck the standing cars proceeded onto and over the team track with considerable speed and that they struck the standing cars "with a great deal more force than was requisite under the circumstances."

All of these facts are amply supported by the evidence.

Section 122, Chapter 110, Cahill's Revised Statutes of Illinois, 1927, is as follows:

> "The Supreme Court shall re-examine cases brought to it by appeal or writ of *certiorari* as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or Appellate Courts upon controverted questions of fact therein."

In *Myers* v. *Pittsburg Coal Co.*, 233 U. S. 184, the trial court submitted the case to the jury to determine whether the defendant was guilty of negligence as charged by the plaintiff, which resulted in the death of her husband, Myers.

On appeal, the Circuit Court of Appeals was of the opinion that upon the facts shown, the plaintiff had not made out the right to recover and the judgment was reversed without directing a new trial and without sending the case back. In the course of its opinion, in reversing the Court of Appeals, the Supreme Court at page 192, said:

> "Unless the testimony was such that no recovery could be had upon the facts shown in any view which could be properly taken of them, the verdict and judgment of the District Court must be affirmed."

"If upon any view which could be properly taken of the facts the evidence tended to establish" the jury

would have been justified in returning a verdict for the injured party, the question of contributory negligence will not defeat a recovery and is for the jury rather than for the court.

Dunlap v. *North Western Ry. Co.*, 130 U. S. 649, 32 L. ed. 1058, 9 S. C. 647.

To the same effect see

Louisville & N. Ry. Co. v. *Woodson*, 134 U. S. 614, 33 L. ed. 1032, 10 S. C. 628.

The general rule is again stated by this court that:

> "Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men could draw different inferences, the question is one for the jury."

Washington & Georgetown Ry. Co. v. *McDade*, 135 U. S. 554, 34 L. ed. 235, 10 S. C. 1044.

III.

The question of assumed risk is not subject to review as it is raised for the first time in this court.

The record discloses that the question of assumed risk was not assigned as error in either the Appellate or Supreme Court of Illinois.

The only reference in the Appellate Court record to any alleged ground for reversal of the judgment by the Appellate Court is found in that court's opinion (Rec. 9) wherein the court said:

> "It is urged as a ground for reversal that from the testimony, the plaintiff * * * was guilty of contributory negligence and that the defendant was not guilty of negligence * * *."

In its petition for certiorari in the Supreme Court of Illinois (Rec. 12, 13), petitioner stated:

"The contention of the petitioner on the trial of this cause in the Superior Court and in the errors assigned for review in the Appellate Court, has been confined to two points:

First. That there is no evidence of any negligence on the part of the petitioner which resulted in injury to the respondent.

Second. That the trial court erred in allowing improper evidence to be submitted to the jury."

Under the caption "Jurisdiction of this Court" petitioner, in its petition, page 9, suggests that one of the controlling questions raised by it in the trial court was that respondent assumed the risk.

The question of assumed risk was submitted to the jury as a question of fact and is fully covered by petitioner's instructions which were more favorable to its contention than it was entitled to under the law (Rec. 219).

By its failure to assign error upon the question of assumption of risk in the Appellate and Supreme Courts of Illinois, petitioner abandoned this point as a ground for reversal.

It has been repeatedly held in both the Appellate and Supreme Courts of Illinois that errors assigned but not argued are waived.

Keyes v. *Kimmel,* 186 Ill. 109.
Duggan v. *Ryan,* 211 Ill. 133.
Pollock v. *Pollock,* 328 Ill. 179.
Jones v. *Beeck,* 197 Ill. App. 119, 120.
Rosenfeld v. *Ehrhart,* 202 Ill. App. 617, 618.

IV.

Even if plaintiff knew that cars were liable to be switched on to the team track in question and assumed the risk of these customary switching operations, nevertheless, he did not assume the increased risk attributable to the unusual and negligent manner in which these cars were operated.

Respondent and three witnesses testified that nine cars (some of which were loaded) were not operated in the usual and customary manner but were propelled against the standing cars on the team track, not only with unusual and unnecessary force and violence, but without any notice or warning to anyone in the vicinity, contrary to petitioner's recognized practice and custom.

In *Chesapeake & Ohio Ry. Co.* v. *Proffitt,* 241 U. S. 462, the court at page 468 said:

> * * * "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."

Choctaw O. & G. R. Co. v. *McDade,* 191 U. S. 68; 48 L. Ed. 96.

Seaboard Air Line v. *Horton,* 233 U. S. 492-502.

Chesapeake & Ohio Ry. Co. v. *DeAtley,* 241 U. S. 310.

V.

Weight to be given concurrent opinions of trial and Appellate Courts.

Bearing in mind that the trial court held the evidence in this case sufficient to go to the jury and that the Appellate Court concurred in the opinion of the trial court, the following statement is especially applicable:

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them."
>
> *Richmond & D. R. Co.* v. *Powers,* 149 U. S. 43, 37 L. ed. 642, 13 S. C. 748.

> "Hence it is that seldom an Appellate Court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment, and if such judgment is approved by the proper Appellate Court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."
>
> *Patton* v. *Texas & Pac. Ry. Co.,* 179 U. S. 658, 45 L. ed. 361, 21 S. C. 275.

In the *Patton* case the trial court directed a verdict in favor of the defendant and this action was approved by the Appellate Court and later by the Supreme Court.

In the case of *Supreme Lodge K. of P.* v. *Beck,* 181 U. S. 48-50, 45 L. ed. 741, 21 Sup. Ct. 532, the *trial court refused to direct a verdict in favor of the defendant* and its action was affirmed by the Appellate Court. When the case came before the Supreme Court of the United States, Mr. Justice Brewer, speaking for the court, said:

> "We have recently had before us a case, coming like this from the Trial Court to the Court of Appeals (*Patton* v. *Texas & P. Ry. Co.,* 179 U. S. 658, *ante* 361, 21 S. C. 275), in which the action of the Trial Court in directing a verdict was vigorously attacked as an invasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower court; and the considerations which then controlled us compel a like action in the present case."

It is to be noted that the court in the *Beck* case seemed to be of the opinion that in the *Patton* case "the question was doubtful"—being the question of the right of the court to direct a verdict for the defendant—but its action was sustained because of the fact that it was concurred in by the lower Appellate Court.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of State trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre,* 242 U. S. 169.

Great Northern Ry. Co. v. *Knapp,* 240 U. S. 464.
Erie R. R. Co. v. *Welsh,* 242 U. S. 303.
Seaboard Air Line v. *Padgett,* 236 U. S. 668.

VI.

The authorities cited and relied on by petitioner do not support its contention that there was no duty imposed by law upon petitioner to warn respondent of the switching movement in question.

The cases cited by petitioner do not sustain its contention and may be readily distinguished from the instant case.

In *Toledo, etc., R. Co.* v. *Allen,* 48 Sup. Ct. 215, cited by petitioner (p. 12), the court specifically stated that there was no evidence in that case that the plaintiff had been exposed to any "unusual danger by reason of a departure from the practice generally followed."

Petitioner's contention that negligence is essential to recovery in an action under the Federal Employers' Liability Act is, of course, conceded. We have at no time contended otherwise.

The *Nixon* case, 271 U. S. 472, also cited and relied on by petitioner, is not in point, as there was no violation of a recognized practice and custom on the part of the defendant in that case, as here. The court in that case based its decision that the defendant could not be held liable, solely on the ground that the plaintiff assumed the risk.

In *Aerkfetz* v. *Humphries,* 145 U. S. 418, where no custom of warning was involved, the court held that a yard track employee assumed the risk of a shifting movement of cars without warning. Manifestly, the *Aerk-*

fetz case—wherein the accident happened on a "yard track," does not tend to support petitioner's contention, as in the instant case there was not only a violation of custom shown which was lacking in that case, but respondent's accident occurred on a team track where cars were being unloaded, and on which track cars were never moved or shifted without timely notice to all persons in and about said cars (Rec. 59, 60, 98, 99).

In *Director General of Railroads* v. *Templin*, 268 Fed. 483, at p. 486, the court said:

> "But in *McGovern* v. *P. & R. Ry. Co.*, 235 U. S. 389, 401, 35 Sup. Ct. 127, 59 L. Ed. 283, where there was evidence of a custom or practice to warn track walkers, the Supreme Court affirmed the action of the trial court in refusing to hold as a matter of law that the injured workman had assumed the risks of the danger and in submitting the question to the jury."

The case of *St. L. & San. Fran. R.* v. *Conarty*, 238 U. S. 243, 249, is obviously not in point, as the court simply held in that case that the violation of the Federal Safety Applicance Act in failing to have a car equipped with a coupler could not be said to have been the proximate cause of an injury occurring to a railroad employee who was not endeavoring or intending to couple or uncouple said car or to handle it in any way, but was merely riding on an engine that collided with it, since the act was passed to obviate the necessity of men going between the ends of cars to couple them.

We respectfully ask that the petition for certiorari herein be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Counsel for Respondent.

APPENDIX.

Section 121, Chapter 110, Cahill's Revised Statutes of Illinois, 1927:

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Court shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court." * * *

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 620. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

NICK MIHAS,

Respondent.

BRIEF FOR NICK MIHAS, RESPONDENT.

JOSEPH D. RYAN,
JOHN P. BRAMHALL,
Counsel for Respondent.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

NICK MIHAS,

Respondent.

BRIEF FOR NICK MIHAS, RESPONDENT.

JURISDICTION.

(For convenience, we shall hereinafter refer to respondent, Nick Mihas, as plaintiff, and to petitioner as defendant.)

In the brief filed in opposition to the defendant's petition for certiorari in this case, we urged that this court was without jurisdiction to entertain the petition, since the petitioner did not exhaust all of the remedies at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had * * *" in accordance with the provisions of Section 237 of the Judicial Code, as amended, Volume 43, Paragraph 1, U. S. Statutes at Large.

It is claimed by defendant that under Subdivision 2 of the Certiorari Law of Illinois, Section 121, Chapter 110, Revised Statutes of Illinois 1927, the Supreme Court may require by "certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court."

It is quite apparent that the statute in question simply conferred upon the State Supreme Court the discretionary power to require by certiorari any case coming within the classification designated to be certified to it for review. Had the Supreme Court of Illinois granted the writ of certiorari in the instant case, that court would not and could not, in the certiorari proceedings, have reviewed the case or entered judgment upon the merits therein, but having awarded the writ, would then cause the case to be docketed as any other cases of writ of error and proceed to review the case by writ of error and pass upon its merits.

The Constitution of the State of Illinois, Section 11, Article 6 (quoted in appendix) gives power to the General Assembly of the State to provide but two methods of review by the Supreme Court of a judgment of the Appellate Court, viz., *by appeal* or *by writ of error,* and any statutory enactment attempting to confer on the Supreme Court of that state, authority to review a judgment by any other method would be unconstitutional.

In the case of *Freitag* v. *Union Stockyard Co.,* 262 Ill. 551, where the Supreme Court of Illinois was passing upon the constitutionality of the State Certiorari Law here in question, that court, at p. 558, said:

> "The constitution, by section 11 of article 6, gives power to the General Assembly to provide for review

by this court of the judgments of the Appellate Court *by appeal* or *writ of error,* and counsel say that the General Assembly cannot devise any other method of review. The act making judgments of the Appellate Court final unless this court, by *certiorari* or otherwise, shall require the record to be brought to this court for review does not contemplate a review of the judgments by *certiorari.* The application for a writ is to enable this court to determine whether the case is of such a character that the judgment ought to be reviewed, and if the writ is awarded to bring the record here, the review is by writ of error. Our rule found in Vol. 242 of the reports of decisions was carefully framed under the act, in accordance with that view. It provides for docketing the petition for the writ in the name of the petitioner, against the respondent, but if the writ is granted the case is then docketed as in any other case of a writ of error. As a transcript must be filed with the petition, it is not necessary to send the writ to the clerk of the Appellate Court, but the transcript filed is to be taken and considered as a due return to the writ and a *scire facias* to hear errors is to be issued for all defendants in error of whom the court has not obtained jurisdiction by an appearance in opposition to the petition."

While it is true that language may be found in an occasional decision of the Supreme Court of Illinois indicating that the denial of writ of certiorari is equivalent to an affirmance of an Appellate Court judgment, as in *Soden* v. *Claney,* 269 Ill. 98, the fact remains that in certiorari proceedings, the Supreme Court does not review the judgment of the Appellate Court and does not in such proceedings enter a final judgment upon the merits of the case.

The Supreme Court of Illinois, neither under the constitution of the state nor under the certiorari statute, has the power or authority to review a case in a certiorari

proceeding. The language of the court in the *Soden* case, *supra,* that the denial of a petition for certiorari is "in effect an affirmance of the judgment," is necessarily true, not because the denial of the writ means that the Supreme Court has reviewed the case and affirmed the judgment of the court below upon the merits of the case, but merely because once the writ is denied, there is no other court of review to which the petitioner may apply, and hence there is no further opportunity afforded the petitioner to have his case reviewed.

In other words, the denial of a petition for certiorari by the Supreme Court of Illinois makes the judgment a final judgment of the Appellate Court and not a final judgment of the Supreme Court.

The cases of *Lamont* v. *Kent,* 253 Ill. 230, and *Rizzo* v. *Catholic Order of Foresters,* 274 Ill. 91, cited by defendant, are not in point, as in both cases the court had under consideration conflicting sections of the State Practice Act and Appellate Court Act, relative to the removal of cases from the Appellate to the Supreme Court, and the court was not called upon in either of these cases to pass upon the question now before this court.

In Section 121 of the Practice Act of Illinois, it is provided that:

> "In any such case as is hereinbefore made final in the said Appellate Courts, it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court."

The Supreme Court of Illinois has not construed this language to mean that it is authorized in a certiorari pro-

ceeding, to review the judgment of an Appellate Court, as such construction would render that section of the Practice Act unconstitutional, but it has, pursuant to the construction set forth in the case of *Freitag* v. *Union Stockyard Co., supra,* and the rule of court mentioned therein, followed the practice, in cases where it grants the writ of certiorari, of thereafter issuing a writ of error, and then proceeding to review the case in such writ of error proceeding.

In view of the foregoing, we respectfully submit that under the authorities cited in our reply to defendant's petition for certiorari filed in this court, viz., *McMasters, et al.* v. *Gould, et al.,* 72 L. Ed. (U. S. Sup. Ct. Advance Opinions, March 15, 1929), p. 337; *Matthews v. Huwe,* 269 U. S. 262, and *Fisher* v. *Perkins,* 122 U. S. 522, this court is without jurisdiction to review this cause. Under the decisions rendered in these and the case of *Freitag* v. *Union Stock Yards Co.,* 262 Ill. 551, *supra,* the denial of the defendant's petition for certiorari by the Supreme Court of Illinois is not such a judgment as may be reviewed by the Supreme Court of the United States, since by its failure to make application to the Appellate Court for a certificate of importance, which, if granted, would have entitled defendant to have its case reviewed upon the merits and obtain a final judgment from the Supreme Court of Illinois, as a matter of right, the defendant did not exhaust all the remedies at hand for obtaining a final judgment or decree from the Supreme Court of Illinois.

STATEMENT OF FACTS.

Defendant's statement of the facts and the *locus in quo* is sufficiently accurate to apprise the court in a general way of the issues involved, but the reference made to the tracks in the yard in question as a "main track and switching lead and three house or team tracks" is quite liable to mislead. We, therefore, deem it essential to make a supplemental statement of our own, in order that the court may have a full understanding of all of the material facts and circumstances pertinent to the issues.

There is but one team track in this yard, viz., the north track, which curves to the south and connects with house track No. 1 at a point 270 feet west of the house in which plaintiff lived, and which runs eastward beyond the plaintiff's house approximately 450 feet and then curves northward across Canal street into the Peru Heating Plant (Defendant's Exhibit 1, R. 128). This team track on which plaintiff was injured is the only track in the yard alongside of which teams and wagons and other vehicles were driven for the purpose of unloading cars situated thereon.

Defendant's photographs, Exhibits 2, 3 and 4, show a clearly defined and much used and traveled driveway extending alongside of this track, which plaintiff testified was customarily used by teamsters in unloading cars for a distance of several hundred feet west of his house and all the way up to the spur track (R. 210). This team track must not be confused with house tracks No. 1 and No. 2 which lead up to the freight house and alongside of the loading platform on either side thereof.

The track just south of team track No. 3 on which the accident occurred, is known as No. 2 house track and ex-

tends along the north side of the loading platform, stopping at the freight house. This track also curves toward the south and connects with No. 1 house track at a point 105 feet east of where No. 3 team track connects with said house track. The next track south of No. 2 house track is known as No. 1 house track and also extends eastward along the south side of the loading platform and freight house in question.

It was necessary for the plaintiff, in order to reach the shanty or what is designated on Defendant's Exhibit 1 as a "lineman's shop"—the place where his speeder was customarily kept and housed—to cross all of these five tracks. This "lineman's shanty" is on the south side of all these tracks directly opposite the house in which he lived (R. 92).

Mihas, the plaintiff, and three witnesses called in his behalf, testified that on the morning of the accident, there was a long string of standing cars on the team track, extending both to the east and to the west of the house in which plaintiff lived (R. 56, 70, 81, 96). The string of cars west of plaintiff's house would necessarily extend onto house track No. 2, as there was room for but three cars on the team track in the clear west of plaintiff's house (R. 130). The team track was usually and customarily filled with standing cars each morning at the time plaintiff was required to cross the tracks to reach his speeder (R. 98). It had been the uniform practice and custom of the defendant to give notice and warning to the men who were engaged in unloading cars on this team track before moving the cars thereon or propelling other cars against the standing cars (R. 60, 72, 99).

Plaintiff had been crossing this track at the place in question for a period of 4 or 5 years with the knowledge

and consent of his boss or foreman (R. 99, 124). The customary method of warning men who were engaged in unloading these cars of any movement of cars on the team track was to send a switchman ahead alongside of the cars to personally tell these men that they were going to "drop cars in there." Plaintiff knew of this custom and relied upon it (R. 99). A coal car directly opposite plaintiff's house was being unloaded the morning of his injury and the men who had been engaged in this work had just moved away from the car a short distance with their second load of coal. Before starting to cross over or between the cars, plaintiff looked carefully in both directions, saw nothing coming and received no warning of any kind of the movement in question (R. 96).

As he was crossing over the track, nine cars—a number of which were loaded—were propelled by means of a flying switch from a point more than 1,000 feet distant on the main track, against the standing cars on the team track, with sufficient violence to move all of the cars on this track 3 or 4 car lengths and to send coal "flying all over there" (R. 71, 80). Cars thus set in motion could not, on account of intervening obstructions and the curve in the track, be seen by the plaintiff as he approached this team track. (See Defendant's photographs, Exhibits numbered 2, 3 and 4.)

It is admitted by defendant that no warning was given of the movement in question. The men engaged in this switching movement had taken these cars from the lead track in the vicinity of Cass street and while in that vicinity, were so situated that they could have observed plainly the men at work unloading the coal car (R. 176, 177).

Defendant contended on the trial that there were but three cars on the team track and that the east end of the

most easterly car was directly opposite the plaintiff's house (R. 176). Defendant made a check of the number of cars on this track each morning and had in its possession records, which it failed to produce, that would definitely show the number of cars thereon (R. 162, 163). The materiality of the respective contentions concerning the number of cars on this track will be pointed out and emphasized in our argument.

SUMMARY OF ARGUMENT.

1. (a) The movement of the nine cars on to the team track "with a great deal more force than was requisite" as found by the Appellate Court of Illinois, clearly constituted actionable negligence.

(b) Whether the added force and violence of this impact, which was sufficient to move a long string of cars three or four car lengths and to scatter coal "all over there" from one of the cars which had been partially unloaded (R. 71, 80, 97) was the proximate cause of the plaintiff's injury, was properly submitted to the jury for determination.

(c) Three of defendant's instructions (R. 220, 221), directing a verdict in its behalf, are predicated upon the essential requirement that the jury find that the switching operation was conducted in the "ordinary and customary manner."

2. (a) Plaintiff had the right to rely upon the observance of the recognized practice and custom to warn persons engaged in unloading cars on this team track and to conform his actions in respect thereto.

C. & A. R. R. Co. v. *Kelly*, 182 Ill. 267.
Pridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.

Louisville R. R. v. *Layton*, 243 U. S. 617.
Minneapolis R. R. v. *Gotschall*, 244 U. S. 66.
Lehigh Valley R. Co. v. *Doktor*, 290 Fed. 760.
Director General of Railroads v. *Templin*, 268 Fed. 483.
I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.

(b) Plaintiff having crossed this team track every morning for several years prior to his injury between cars standing thereon, with the knowledge and consent of his foreman, notice of such practice and custom was imputable to defendant (R. 99).

(c) Had the custom of sending a man ahead alongside of the cars been followed, plaintiff would have been apprised of the switching movement and the accident would not have occurred.

3. Evidence of a violation of the custom to give warning before switching cars on to the team track was properly admissible under the laws of Illinois and the decisions of the highest court of that state.

C. & A. R. R. v. *Kelly*, 182 Ill. 267.
Pridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.
I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.
St. L. A. & T. H. R. Co. v. *Eggman*, 161 Ill. 155.
E. St. L. & C. Ry. Co. v. *Eggman*, 170 Ill. 538.
Otstot v. *I. I. & I. R. R. Co.*, 103 Ill. App. 136, 139.
Erlich v. *Chicago, G. W. R. Co.*, 160 Ill. App. 379.

This court, under its decisions, is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony.

Nashua Savings Bank v. *Anglo-American Co.*, 189 U. S. 221, 228.
Central Vermont R. R. Co. v. *White*, 238 U. S. 507.
Bucher v. *Cheshire R. R. Co.*, 125 U. S. 55.

Franklin Sugar Refining Co. v. *Luray Supply Co.*, 6 Fed (2d) 218, 220, and cases there cited.

4. (a) Defendant's contention that a verdict should have been directed in its favor raises the naked legal question whether there is any evidence in the whole record which from its reasonable intendments and inferences, fairly tended to make out plaintiff's case.

Chicago City Ry. Co. v. *Martensen*, 198 Ill. 511, 512.

Chicago City Ry. Co. v. *Loomis*, 201 Ill. 118, 119.

Mahlstedt v. *Ideal Lighting Co.*, 271 Ill. 154, 163.

Peters v. *Chicago Rys. Co.*, 307 Ill. 202, 205.

(b) The plaintiff is entitled to have his case submitted to the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts that the evidence tends to establish.

Texas & Pac. Ry. Co. v. *Cox*, 145 U. S. 593, 606.

Richmond & Danville Rd. v. *Powers*, 149 U. S. 43, 45.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.

5. By its failure to assign error upon the question of assumption of risk in the Appellate and/or the Supreme Courts of Illinois, defendant abandoned the question and it is not subject to review in this court (Assignment of Errors in Appellate Court, R. 224, erroneously captioned as in the Supreme Court of Illinois. Assignment of Errors in Supreme Court of Illinois, R. 3).

Freesen v. *Scott County Drainage District*, 283 Ill. 536, 544.

Anglo-Wyoming Oil Fields v. *Miller*, 216 Ill. 272, 273.

Hodges v. *The Bankers Surety Co.*, 152 Ill. App. 372, 390.

Kozowski v. *Ostrowski*, 163 Ill. App. 199, 203.
Keyes v. *Kimmel*, 186 Ill. 109.
Duggan v. *Ryan*, 211 Ill. 133.
Pollock v. *Pollock*, 328 Ill. 179.
Jones v. *Veeck*, 197 Ill. App. 119, 120.
Rosenfeld v. *Ehrhart*, 202 Ill. App. 617, 618.
Harding v. *Illinois*, 196 U. S. 78, 83.

6. (a) If this court should decide that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted and should further hold that the subject of assumed risk had not been abandoned in the state courts and is open to review here, nevertheless the facts in evidence afforded no ground for the application of the doctrine of assumption of risk.

Yazoo & Miss. Valley R. R. v. *Wright*, 235 U. S. 376.
Central Vermont Ry. v. *White*, 238 U. S. 510.

(b) In any event if the doctrine of assumed risk is applicable to the facts in evidence, that question was properly submitted to the jury for determination.

Knapp v. *Great Northern Ry. Co.*, 130 Minn. 405 (affirmed 240 U. S. 464).

7. In the absence of clear and palpable error, this court will not disturb the concurrent findings of state, trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre*, 242 U. S. 169.
Patton v. *Texas & Pac. Ry. Co.*, 179 U. S. 658.
Supreme Lodge K. of P. v. *Beck*, 181 U. S. 48, 50.

8. The cases cited by defendant are to be distinguished in that in none of them was there involved a violation of any custom or rule of the defendant, or any unusual movement creating an extraordinary danger or hazard.

Chesapeake & Ohio Ry. Co. v. *Deatley*, 241 U. S. 310.

Gila Valley, etc., Ry. v. *Hall*, 232 U. S. 94.

Knapp v. *Great Northern Ry. Co.*, 240 U. S. 464.

ARGUMENT.

I.

1. (a) The movement of the nine cars on to the team track "with a great deal more force than was requisite" as found by the Appellate Court of Illinois, clearly constituted actionable negligence.

(b) Whether the added force and violence of this impact, which was sufficient to move a long string of cars three or four car lengths and to scatter coal "all over there" from one of the cars which had been partially unloaded (R. 71, 80) was the proximate cause of the plaintiff's injury, was properly submitted to the jury for determination.

Defendant contends under Point II of its argument (Brief, pp. 12, 13) that "there was no evidence that the mere added violence of the impact was the proximate cause of the injury to Mihas" and further that even if it be conceded that the cars were propelled against those standing on the team track with "more force than was reasonably requisite" and that "the mere added violence of the impact" was the proximate cause of the plaintiff's injury, these facts would not constitute negligence since "Mihas

was in a place where he had no right to be and his presence there was unknown and unsuspected." This is clearly a mistaken view of the situation and ignores entirely the primary duty imposed upon the master to exercise ordinary care for the safety of its servant.

There is no dispute in the record that it was plaintiff's custom and practice to cross between standing cars on this team track and that he had done so for a number of years with the knowledge and consent of his foreman (R. 99). Under these circumstances, knowledge of plaintiff's practice was imputable to defendant.

The fact that the plaintiff was the only employee who lived on defendant's premises and who customarily crossed the tracks at the place of the accident, does not affect the primary duty which defendant owed to him, nor does it exempt the defendant from liability for the consequence of its negligence in operating the cars in question at an excessive rate of speed and "with a great deal more force than was requisite under the circumstances," as found by the Appellate Court of Illinois. In the light of the undisputed evidence that plaintiff had customarily crossed the tracks every morning for a number of years on his way to his speeder, with the knowledge and implied consent of his foreman, there is no basis for the claim that plaintiff was in a place "where he had no right to be" and where his presence "was unknown and unsuspected."

The contention that defendant owed the plaintiff no duty in the circumstances is manifestly untenable and if adopted in the case at bar, would necessarily lead to the conclusion that the defendant would be under no legal obligation to exercise any care not to injure any number of its employees, had they been required to live in the house occupied by plaintiff and to cross the track in question in the course of their employment.

If the cars in question were propelled with unusual and unnecessary force and violence against the standing cars on the team track—as found by the Appellate Court of Illinois—apart from any violation of the custom to warn the teamsters, then the defendant was clearly guilty of negligence and the plaintiff could not be held to have assumed the increased risk attributable to the negligent departure from the customary method of switching these cars. Had the customary method been followed, and had the cars been propelled against those standing on the team track in the usual manner, we submit that plaintiff could have passed over or between them in safety.

Concerning the force or violence of the impact when the nine cars were propelled against those standing on the team track, plaintiff testified (R. 96):

> "Q. Now what did you do? You say you saw a truck unloading coal. Tell us from then on what happened, what you did before you started to c s the track.
>
> "A. Well, I see the truck on the north side of the house. I thought it was safe, see. I look on one side, I look the other side for anything moving, anything around. I don't see nothing coming and I climb the car, and there was coal car there, and I climb over the coal car. As soon as I get the car and before I get the car, I was ready to get on the top of the car, see? and I heard hit the cars so hard, and it thrown me inside of the cars in there."

And further (R. 97):

> "Q. What was your position? Were you on the stirrup on the end of the car or passing between them or what?
>
> "A. No, I had got on two step. On two step I was. I was ready to get on car. I was just going in between the cars.
>
> "Q. What cars were you passing between, the coal car and some other car?

"A. I had my hand on coal car, see, and box car was on the side. As soon as I put my toes up when then he hits me then.

"Q. What kind of a bump was it?

"A. Oh, it was terrible. * * *"

The unusually violent movement caused these cars to move suddenly and unexpectedly three or four car lengths (R. 71, 80) and the added violence of the impact undoubtedly created an unusual danger or extraordinary hazard. It was clearly a question for the jury in the circumstances whether the unusual danger and hazard created by the added force or violence was the proximate cause of plaintiff's injury.

That the movement of the nine cars on to the team track "with a great deal more force than was requisite" constituted actionable negligence, was recognized in principle by the defendant, since in three of the instructions offered by the defendant and given on its behalf to the jury, it was made an essential requisite to a recovery by the plaintiff that the jury find that the switching operation was conducted in the "ordinary and customary manner" (R. 220, 221).

It is not essential in order to constitute proximate cause, that the precise injury which resulted from the defendant's negligence should have been foreseen and defendant's argument that it owed the plaintiff no duty because he was at a place "where he had no right to be" and where "his presence was unknown and unsuspected" is manifestly based on a false premise.

II.

Plaintiff had the right to rely upon the observance of the recognized practice and custom to warn persons engaged in unloading cars on this team track and to conform his actions in respect thereto.

Plaintiff based his right to recover on the evidence submitted by him that there was a departure from the switching practice customarily followed in that yard, (1), in that the cars in question were propelled against the standing cars on the team track with unusual and unnecessary force and violence, and (2), that the custom of sending someone ahead to notify teamsters that cars were to be placed on the team track in order that these men might guard themselves against the danger arising from the cars coming in contact with those standing on said track, had not been observed.

Defendant conceded on the trial and the Appellate Court found that no warning had been given to these men who had been engaged in unloading on this track and who had just started away with their truck from the side of the coal car when the impact occurred (R. 98, 99).

Defendant argues (Brief, pp. 14, 15) that the Appellate Court of Illinois erred in holding that the custom to notify persons unloading cars on the team track "whenever defendant was about to run cars in and upon said track," inured to the benefit of plaintiff, since "he was not within the class of persons intended to be protected thereby." And further that even if it were true that there was a duty on the part of defendant to give notice and warning "which is not believed to be the case, since these men had finished unloading and were leaving the premises," nevertheless, under the decisions of this court, a breach of that duty re-

sulting in an injury to an employee such as here, would not as to him be actionable.

It will be observed that at the time the cars in question were set in motion at a point 300 feet west of the switch leading from house track No. 1 on to the main track (R. 201), or approximately 1,200 feet from the team track, the men engaged in unloading the truck were either on the car unloading it or in close proximity to it. These cars had been moved westward from the lead track on to the main track from a place directly alongside of where the work of unloading was in progress and defendant's servants had ample notice of the fact that these men were so engaged (R. 176-177). It is quite apparent that no attempt was made by these employees to determine whether these cars could, with safety, be propelled against those standing on the team track. The movement was made in utter disregard of the safety of these men who, unquestionably, were at work in and about the coal car at the time these cars were set in motion and who were but 30 or 40 feet from the side of the coal car at the moment of the impact (R. 70).

It is likewise apparent that had defendant sent someone ahead alongside of the car that was being unloaded to warn the men thus engaged that cars were to be propelled on to the team track and against those standing there, plaintiff would have seen him. It will be observed also that the truck load of coal had moved but 30 or 40 feet from the side of the car and that the nine cars, some of which were loaded, were propelled against the standing cars on the team track with sufficient violence to move all of the cars on this track three or four car lengths and to send coal "flying all over there" (R. 71, 80).

In support of its contention that the custom to warn men, who were working in and about and unloading cars stand-

ing on the team track, when they were about to be moved or others propelled against them, did not inure to the benefit of the plaintiff because he was not within the class of persons intended to be protected thereby, defendant relies upon the case of *St. L. & San Fran. R. R.* v. *Conarty,* 238 U. S. 243, 249. We submit that this case does not support its contention, since the court there merely decided that the absence of automatic couplers from one of the cars involved in the collision which resulted in injury to the plaintiff in that case, was not the proximate cause of the collision and injury. This decision was so construed in the case of *Davis* v. *Wolfe,* 263 U. S. 239, wherein the court reaffirmed the doctrine announced in the case of *Louisville R. R.* v. *Layton,* 243 U. S. 617, to the effect that where a failure of a railway company to comply with the Safety Appliance Act, is the proximate cause of an accident resulting in injury to an employee while in the discharge of his duty, he may recover, even though the operation in which he was engaged was not of the kind in which the appliances required by the act were specifically designed to furnish the protection. It is said (Opinion, p. 621):

> "The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured."

And the court further distinguishes the *Conarty* case, 238 U. S. 243, *supra,* as well as the *Lang* case, 255 U. S. 455, and quotes with approval from the latter case that "necessarily there must be a causal relation between the fact of delinquency and the fact of injury."

In *C. & A. R. R. Co.* v. *Kelly,* 182 Ill. 267, appellee's intestate, at the time of his death, was in the employ of the

United States as a mail clerk. It was his duty to transfer mails to and from various trains arriving and departing from the depot. While so employed and while crossing one of defendant's tracks, he was struck by an engine of a freight train and killed. On the trial, appellee introduced in evidence certain rules of the defendant in effect requiring approaching trains to come to a stop before reaching a train which was then stopped at the station and that trains must not exceed 6 miles an hour when passing through incorporated cities and towns. In determining whether deceased was in the exercise of ordinary care for his own safety it is said, p. 270:

> "To properly determine this question, it should be borne in mind that the appellee's intestate had been a transfer clerk in the United States mail service, at this junction, for more than a year before his death. *It is reasonable to infer from his length of service he was acquainted with the rules of appellant in respect to the running of its trains, and that he would, in the exercise of ordinary care, conform his actions in respect thereto.*" (Italics ours.)

The court also held that a rule of the post office department regulating the conduct of clerks in the transfer of mail was admissible in evidence, since the defendant, as part of its business, transported mails; that being in a sense in the same line of employment with the deceased in handling the mail it was familiar with the rule in question and was familiar with his duties and should have expected his presence at the time and place in question in the discharge of his duties under such rule.

To the same effect are:

Lehigh Valley R. Co. v. *Doktor*, 290 Fed. 760.

Director General of Railroads v. *Templin*, 268 Fed. 483.

Toledo, St. L. & W. R. Co., et al. v. *Bartley*, 172

Fed. 82.

Pacheco v. *New York, N. H. & H. R. Co.*, 15 Fed. 2d, 467.

Fridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.

Otstot v. *I. I. & I. R. R. Co.*, 103 Ill. App. 136, 139.

I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.

St. L. A. & T. H. R. Co. v. *Eggman*, 161 Ill. 155.

E. St. L. C. Ry. Co. v. *Eggman*, 170 Ill. 538.

Ehrlich v. *Chicago, G. W. R. Co.*, 160 Ill. App. 379.

C. & N. W. Ry. Co. v. *Thomson, Admx.*, 128 Ill. App. 594 (and cases cited).

Devine v. *Chicago Junction Ry. Co.*, 167 Ill. App. 195.

Hall v. *C. & A. R. Co.*, 188 Ill. App. 95.

While it is true that facts which create a relation and therefore a duty as to one person, do not necessarily establish the same obligation to another person or class of persons not intended to be protected thereby, nevertheless where facts are shown which make the reason for claiming a relation applicable, then such other person or class of persons are within the right created.

In *Minneapolis R. R.* v. *Gotschall*, 244 U. S. 66, wherein a brakeman was thrown from a car as the result of defective couplers becoming open while the train was in motion, it was held that the employee was entitled to recover because the defective coupler was the proximate cause of the accident.

The Safety Appliance Act was designed and intended to obviate the necessity of men going between the cars to couple and uncouple them, yet the court based its decision that Gotschall was entitled to recover—his injury having been shown to have been proximately caused by the defective coupler—on the ground that the safety appliance laws were not confined in their terms to the protection of employees only when engaged in coupling or uncoupling cars.

It is manifest from the decisions in all of these cases that these laws inure to the benefit of a different class of persons than those intended to be protected thereby.

We respectfully submit that proof of an established practice and custom to warn men while engaged in unloading cars on the team track in question inured to the benefit of all of defendant's employees who knew of such custom and relied upon it. The cases cited by defendant in support of its contention that it owed no duty to the plaintiff because failure to give notice or warning of the switching operation to others differently situated from plaintiff was not as to him actionable, are inapplicable to the case at bar, as in these cases there was no causal connection shown between the negligent acts complained of and the resulting injuries.

III.

3. Evidence of a violation of the custom to give warning before switching cars on to the team track was properly admissible under the laws of Illinois and the decisions of the highest court of that state.

This court, under its decisions, is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony.

In the case of *Franklin Sugar Refining Co.* v. *Luray Supply Co.*, 6 Fed. 2d, 218 (Cir. Ct. of Appeals, 4th District), at p. 220, the court said:

> "The fact that this court is bound by and should follow the decision of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United States (R. S. 721, 914) Comp. St. 1538, 1537), as by the decisions of its courts. *McNeil* v. *Holbrook*, 12 Pet. 84, 9 L.

Ed. 1009; *Vance* v. *Campbell*, 1 Black, 427, 17 L. Ed. 168; *Conn. Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 710; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 55, 8 S. Ct. 974, 31 L. Ed. 795; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 228, 23 S. Ct. 517, 47 L. Ed. 782; *Central Vermont R. R. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1436, * * *."

In *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, the rule is announced that this court considers only assignments relating to matter of practice, pleading and evidence which involves a construction of the Federal statute. It is said, p. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and the various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a State Court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486."

And at pages 515, 516, it is said:

> "Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the Railway Company to show that under the Federal law all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute and neither directly nor indirectly affect any Federal right. Those assignments, therefore, under Jud. Code, Sec. 237; Rev. Stat., Sec. 709, will not be reviewed on a writ of error to a state court. *Seaboard Air Line* v. *Duvall*. See also *Chicago Junction Ry.* v. *King*, 222 U. S. 222, and *Yazoo & Miss. R. R.* v. *Wright*, 235 U. S. 376, which state the rule where similar cases are brought here by writ of error to a Federal Court."

Under the overwhelming weight of authority, as shown by the decisions heretofore cited, evidence of the practice and custom in question was properly admissible under the law of Illinois and the rules of practice in the courts of that state.

The admission of this evidence deprived defendant of no substantive right or defense. The rule making evidence of a practice and custom of the defendant, in the conduct of its business and the operation of its engine and cars at the place in question admissible, is a just and reasonable one. It was not only proper for the plaintiff, but it was his duty to conform his actions and conduct to the practices and customs of his employer, of which he had knowledge. If the plaintiff had suffered injury by reason of his failure to conform his actions to a practice or custom of the defendant with which he was familiar, it would have been proper for the defendant to introduce evidence of such practice or custom. It could not be said in such a case that admission of such practice or custom in evidence would destroy any substantive right of the plaintiff under the Federal Act.

IV.

Defendant's contention that a verdict should have been directed in its favor raises the naked legal question whether there is any evidence in the whole record, which from its reasonable intendments and inferences fairly tended to make out plaintiff's case.

Chicago City Ry. Co. v. *Martensen,* 198 Ill. 511, 512.

Chicago City Ry. Co. v. *Loomis,* 201 Ill. 118, 119.

Mahlstedt v. *Ideal Lighting Co.,* 271 Ill. 154, 163.

Peters v. *Chicago Rys. Co.,* 307 Ill. 202, 205.

(a) In passing on a motion to direct a verdict, the court must look to the evidence supporting the claim of the party against whom the motion is directed in the light most favorable to him without considering contradictory evidence or weighing the evidence.

Mahlstedt v. *Ideal Lighting Co.*, 271 Ill. 154, 163.
Kelly v. *Chicago City Ry. Co.*, 283 Ill. 640.

(b) Where under all the evidence any question of fact exists or where reasonable minds could draw different inferences from circumstances shown without contradiction, the case must be submitted to the jury.

Peters v. *Chicago Rys. Co.*, 307 Ill. 202, 205.
Roberts on Federal Liability of Carriers, Vol. 1, Sec. 461, p. 798.
Hudson & M. R. Co. v. *Iorio*, 239 Fed. 855.
Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 501.
Brown v. *Illinois Terminal Co.*, 319 Ill. 326, 334.
Penn. Co. v. *Donat*, 239 U. S. 50.
North Car. R. R. Co. v. *Zachary*, 232 U. S. 248.
Davis v. *Chicago, R. I. & P. Co.*, 158 N. W. 911 (Minn.).
Padgett v. *Seaboard Air Line Ry.*, 99 S. C. 364, 83 S. E. 633 (affirmed 236 U. S. 668).

(c) The plaintiff is entitled to have his case submitted to the jury, unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which could be properly taken of the facts that the evidence tends to establish.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593, 606.

(d) Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact; and this is true whether the

uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair minded men will honestly draw different conclusions from them.

Richmond & Danville Rd. v. *Powers,* 149 U. S. 43, 45.

The controverted question concerning the number of cars on the team track becomes vitally important in determining whether the defendant was negligent and whether the plaintiff was in the exercise of ordinary care for his own safety.

Plaintiff and three of his witnesses testified that there was a long line of cars extending both to the east and to the west of plaintiff's house at the time of the accident. The cars extending westward would necessarily obstruct plaintiff's view of the oncoming cars.

Plaintiff's witnesses further testified that the nine cars were impacted against those standing on the team track with sufficient violence to move them three or four car lengths. Had there been but three cars on this team track, as contended by the defendant, with a clear space to the east of them, such an impact would undoubtedly have moved them a much greater distance. Further, had there been but three cars on this track and if the east end of the coal car—the most easterly car—was opposite to plaintiff's house, why should he walk toward the west and then attempt to climb over or between the cars if there was a clear open space directly between his house and the place where his speeder was kept? And even if there had been but three cars on this track and had plaintiff walked across the track toward his speeder in the open space east of the coal car, he would have been injured just as surely by the unexpected and violent movement of these cars as if he had been crossing between them.

If plaintiff's evidence to the effect that there was a long string of cars customarily on this team track every morning at the time he crossed the tracks in question, as well as on the morning of the accident, was untrue, it is reasonable to assume that defendant would have produced its records on the trial to refute such evidence and to show that there were but three cars on this track. Its failure to do so raises a presumption against the defendant and in favor of the plaintiff on this controverted question of fact.

Defendant contended throughout the trial that the three cars on the team track were in the clear of No. 1 house track, and that there were no cars standing on house track No. 2 (R. 176, 180).

Defendant's witness, Pope, in response to a question asked on cross-examination (R. 186, 187) as to why he did not make the movement in question from the house track onto the team track, instead of from the main track, stated:

> "Why, I didn't have room unless I cut off and went in and shoved them cars."

This notwithstanding there was "practically about 500 feet" along house track No. 1 (R. 187) between the switch leading from the main track to the switch connecting with the team track. And again (R. 188) this witness was asked:

> "Q. Then you did not have room on the team track for the nine cars? A. No, unless I went in and shoved them up and made room."

It will be observed from the foregoing that the testimony of plaintiff and his witnesses to the effect that there was a long string of cars extending westward from plaintiff's house onto house track No. 1, was unquestionably correct, and that these cars obstructed plaintiff's view of the switching movement in question when the nine cars were

set in motion from a point approximately 1200 feet west of his house and that such a movement could not in the circumstances have reasonably been anticipated by him (R. 141, 142, 201 and see defendant's plat, R. 128).

V.

By its failure to assign error upon the question of assumption of risk in the Appellate and/or the Supreme Courts of Illinois, defendant abandoned the question and it is not subject to review in this court (Assignment of Errors in Appellate Court, R. 224, erroneously captioned as in Supreme Court of Illinois. Assignment of Errors in Supreme Court of Illinois, R. 3).

Not only did the defendant fail to assign error on the subject of assumed risk in the Appellate and Supreme Courts of Illinois, as an examination of the record discloses, but it is evident from the Appellate Court opinion that there were but two assignments of error relied on for reversal in that court. In its opinion (R. 9) the Appellate Court said:

> "It is urged as ground for reversal that from the testimony, the plaintiff, in attempting to cross over the cars in question, was guilty of contributory negligence and that the defendant was not guilty of negligence in making the flying switch in question."

It has been repeatedly held in both the Supreme and Appellate Courts of Illinois that alleged error which is not assigned, even though it be argued or discussed in the appellants' brief, is waived and will not be considered by the reviewing court.

Freesen v. *Scott County Drainage District*, 283 Ill. 536, 544.

Anglo-Wyoming Oil Fields v. *Miller*, 216 Ill. 272, 273.

Hodges v. *The Bankers Surety Co.*, 152 Ill. App. 372, 390.

Kozowski v. *Ostrowski*, 163 Ill. App. 199, 203.

The rule has also been repeatedly laid down that errors assigned but not argued are likewise waived and will not be passed upon.

Keyes v. *Kimmel*, 186 Ill. 109.

Duggan v. *Ryan*, 211 Ill. 133.

Pollock v. *Pollock*, 328 Ill. 179.

Jones v. *Veeck*, 197 Ill. App. 119, 120.

Rosenfeld v. *Ehrhart*, 202 Ill. App. 617, 618.

In view of the failure of defendant to assign error on the question of assumption of risk in either the Appellate or Supreme Courts of Illinois, and the fact that it appears from the opinion of the Appellate Court that this question was not relied upon in that court, we submit that the defendant has abandoned the subject of assumed risk as a ground for reversal, and it is not properly before this court for review.

Defendant contends that its assignments of errors in both the Appellate and Supreme Courts are broad enough to cover the defense of assumption of risk; that the instructions to the jury show that it was made an issue in the trial court and that "the defense of assumption of risk was pressed in the petition for writ of certiorari" in the Supreme Court of Illinois.

It is not questioned that assumption of risk was in issue in the trial court and that the jury were fully instructed on this subject, but as heretofore suggested, this defense was abandoned in the Appellate and Supreme Courts by defendant, since it failed to assign error in either court on this subject. The fact that it was sought to be revived in the petition for certiorari in the Supreme Court of Illi-

nois, does not remedy the situation, first, because it was not mentioned or referred to in the assignment of errors in that court and, second, because even if it had been assigned and argued in the Supreme Court of Illinois, that court would not and could not consider or pass upon it, since it was not referred to or contained in the assignment of errors in the Appellate Court of Illinois.

A brief reference to the authorities shows that defendant's assignments of errors in the Appellate and Supreme Courts are not broad enough to include assumption of risk, as it is the rule in Illinois that "every error of which complaint is made, must be specifically pointed out in the assignment of errors." *Village of Northbrook* v. *Sterba,* 318 Ill. 360, 363-364.

Under the Federal Employers Liability Act, the burden of proving that plaintiff assumed the risk is upon the defendant.

Seaboard Air Line Railway v. *Moore,* 228 U. S. 433; 57 L. Ed. 907.

Central Vermont Ry. Co. v. *White,* 238 U. S. 507; 59 L. Ed. 1433.

There is not the slightest reference to this affirmative defense in defendant's assignments of errors in either the Illinois Appellate and Supreme Courts and their general assignments of errors relative to the refusal of the court to grant defendant a new trial or to find the defendant not guilty at the close of the plaintiff's evidence, or at the close of all the evidence, do not cover or include the defense of assumption of risk.

In the case of *Donnelly* v. *Chicago City Ry. Co.,* 163 Ill. App. 7, the court said, pp. 13-14:

"A considerable portion of the reply brief of the appellant is given to a discussion of its claim that the

present suit cannot be prosecuted as being barred by the Statute of Limitations, and our attention is again called to the matter by the petition for rehearing. No assignment of error is based specifically upon the proposition that the suit is barred by the Statute of Limitations. In the petition for rehearing, it is insisted that assignments 1, 2, 3 and 13 are sufficient to warrant the court in passing upon the point mentioned. These assignments are:

"'The verdict is against the evidence.

"'The verdict is against the weight of the evidence.

"'The verdict is against the law.

"'The trial court erred in refusing to instruct the jury at the close of all the testimony in the case to find the appellant not guilty.'

"The contention is not specifically covered by any ground urged on the motion for a new trial, and we think on the authority of *Berry* v. *City of Chicago*, 192 Ill. 154, that it is not raised by any assignment of error. In that case the court held:

"'Every error must be specifically pointed out in the assignment of errors so clearly that from the showing error is manifest, and an error not assigned is not open to review,'

thus reaffirming what was said in *Skakel* v. *People*, 188 Ill. 291; *Swift & Co.* v. *Fue*, 167 Ill. 443; *Gibler* v. *City of Mattoon*, 167 Ill. 18."

In the case of *Harding* v. *Illinois*, 196 U. S. 78, at p. 83, the court said:

"This court has no general power to review or correct the decisions of the highest State court and in cases of this character exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority. *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380. * * * But neither the petition for a rehearing or petition for writ of error in the State Court after judgment, or

assignments of error in this court, can supply deficiencies in the record of the State Court, if any exist. *Simmerman* v. *Nebraska,* 116 U. S. 54. Nor does the certification of the briefs by the clerk of the State Supreme Court, which are no part of the record, help the matter. *Zadig* v. *Baldwin,* 166 U. S. 485. We are to try the case upon the duly certified record, legally made in the State Court and upon which its decision rests. *Powell* v. *Brunswick County,* 150 U. S. 433, 439."

VI.

If this court should decide that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted and should further hold that the subject of assumed risk had not been abandoned in the state courts and is open to review here, there is sufficient evidence in the record to show that this question was properly submitted to the jury.

Plaintiff and three witnesses testified that the cars in question were not operated in the usual and customary manner, but were propelled against the standing cars on the team track with unusual and unnecessary force and violence.

In *Chesapeake & Ohio Ry. Co.* v. *Proffit,* 241 U. S. 462, the court at page 468 said:

> * * * "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."
>
> *Choctaw O. & G. R. Co.* v. *McDade,* 191 U. S. 64; 48 L. Ed. 96.
>
> *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 502.
>
> *Chesapeake & Ohio Ry. Co.* v. *DeAtley,* 241 U. S. 310.

The question of assumed risk was submitted to the jury as a question of fact and is fully covered by defendant's instructions (R. 219).

In the case of *Knapp* v. *Great Northern Ry. Co.*, 130 Minn. 405; 153 N. W. 848, the plaintiff was injured because of his placing his arm over an unguarded shaft which resulted in his coat sleeve being caught and his arm being drawn around the shaft and cut off. The court in that case used the following language:

> "Under the Federal Act *contributory negligence* does *not* defeat recovery, it merely serves to reduce the damages, while assumption of risk, under the facts of the case at bar, is a complete defense. For that reason *plaintiff's counsel desires everything which tends toward proving assumption of risk attributed to plaintiff's negligence, and defendant's counsel is equally eager to resolve all appearance of contributory negligence into an assumption of risk.*"

The court also held that the act of plaintiff in *inadvertently bringing his arm in contact* with an unguarded set screw on a revolving shaft was "referable to plaintiff's *negligence* rather than to assumption of known and appreciated danger arising out of defendant's negligence."

That case was affirmed by this court and is reported as *Great Northern R. Co.* v. *Knapp*, 240 U. S. 464; 60 L. Ed. 745.

The distinction between assumed risk and contributory negligence is clearly pointed out in the case of *Schlemmer* v. *Buffalo & C. Ry. Co.*, 220 U. S. 590, in which the court say (p. 596):

> "an employe is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known or are so plainly observable that the employe may be presumed to know of them, and if he continues

in the master's employ without objection, he takes upon himself the risk of injury from such defects.

"Contributory negligence on the other hand, is 'the *omission* of the employe *to use those precautions* for his own safety which ordinary prudence requires.'"

"The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. *The act more immediately leading to a specific accident is called negligent.* But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master * * * then, *unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name.*"

Schlemmer v. *Buffalo R. & P. R. Co.*, 205 U. S. 1; 51 L. Ed. 681; 27 Sup. Ct. 407.

Plaintiff did not assume the risk of the negligence of other of defendant's employees suddenly and unexpectedly arising.

Seaboard Air Line v. *Horton*, 233 U. S. 492.

Roberts on Federal Liability of Carriers, Vol. 1, Secs. 557, 558 (citing cases).

Gila Valley, etc., Ry. v. *Hall*, 232 U. S. 94; 58 Law Ed. 521.

Chesapeake & O. Ry. Co. v. *DeAtley*, 241 U. S. 310.

Choctaw O. & G. R. Co. v. *McDade*, 191 U. S. 64.

Roberts v. *C. C. C. & St. L. Ry. Co.*, 202 Ill. App. 480, 499-500.

Warren v. *Jackson*, 204 Ill. App. 576, 587.

Engel v. *C. B. & Q. R. R. Co.*, 111 Neb. 21; 195 N. W. 523.

Chicago Hair & Bristle Co. v. *Mueller*, 203 Ill. 558, 564.

If defendant's contention that it owed no duty to plaintiff because the custom to warn did not inure to his benefit and that the switching movement in question was performed in the usual and customary manner, then no negligence was proved and the question of assumed risk was not involved.

If the cars were switched "with a great deal more force than was requisite" and/or in violation of a custom which did inure to the benefit of plaintiff, thereby proximately causing or contributing to his injury, then the doctrine of assumed risk was either wholly inapplicable or at most required submission of the question to a jury for determination.

VII.

Weight to be given concurrent opinions of state trial and Appellate Courts.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of state trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre*, 242 U. S. 169.

To the same effect are:

Patton v. *Texas & Pac. Ry. Co.*, 179 U. S. 658; 45 L. Ed. 361; 21 S. C. 275.

Supreme Lodge K. of P. v. *Beck*, 181 U. S. 49; 45 L. Ed. 741; 21 Sup. Ct. 532.

VIII.

The cases cited by defendant are to be distinguished in that in none of them was there involved a violation of any custom or rule of the defendant, or any unusual movement creating an extraordinary danger or hazard.

A number of cases have been cited by defendant, among which are *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426, 430; *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Toledo & St. L. W. R. Co.* v. *Allen*, 48 Sup. Ct. 215, and *Chesapeake & O. R. Co.* v. *Nixon*, 271 U. S. 218, 70 L. Ed. 914, in support of its contention that defendant owed plaintiff no duty except not to wilfully or wantonly injure him.

In the *Aeby* case, 275 U. S. 426, 430, the plaintiff, who was a station agent, sustained injuries in falling upon an icy platform. The court held that the carrier's failure to remove snow and ice from the station platform did not violate any duty owed by the carrier to the station agent, since the latter's knowledge of the situation and of whatever danger existed by reason of the icy condition of the platform, was at least equal to that of the carrier; that the station agent assumed the risk of these known conditions and dangers and that the facts in evidence were insufficient to sustain a finding that the carrier was guilty of negligence.

The *Aerkfetz* case, 145 U. S. 418, was decided in May, 1892, prior to the enactment of the Federal Employers' Liability Act, which was passed in 1908. The facts in that case are not analogous to the facts in the instant case. Aerkfetz was a track worker engaged in repairing tracks. A switch engine "was constantly moving forwards and backwards in the yard where he worked." He knew that cars constantly used the tracks, but he "remained at work

without looking backward or watching for the moving train." He was at work in a place of danger and of necessity he was required to be constantly on the lookout. There was no rule or custom to give any signal or warning to persons situated as he was. The court held that the cars were not operated at a greater rate of speed "than that which was customary." The court further said that there was no duty, under the existing circumstances, to ring a bell or give a signal, because this would have been confusing. It was further held that Aerkfetz "had all the time knowledge of what was to be expected."

Plaintiff in the case at bar, had no knowledge nor reason to believe that the nine cars in question would be propelled against the cars standing on the team track "with a great deal more force than was requisite" and without notice or warning to the men who were engaged in unloading cars on this track.

In the *Allen* case, 48 Sup. Ct. 215, it was held that there was no showing "that the movement in question created an unusual hazard" and further that "in the absence of proof that he (plaintiff) was exposed to some unusual danger by reason of a departure from the practice generally followed" it could not be said that defendant was guilty of negligence. And again the court said that the men switching the cars "were not required to vary the switching practice customarily followed in that yard or to warn or take other steps to protect him."

In the case at bar, plaintiff's claim is that the defendant did not follow the customary practice, but on the contrary contended that because the customary practice was not followed, defendant was chargeable with negligence.

The *Nixon case*, 271 U. S. 218, is quite similar in principle to the *Allen* case. Nixon was riding along defendant's

tracks upon a velocipede on his way to work when he was overtaken by a train and killed. The accident and death occurred on one of the main lines of the defendant and not in a railroad yard. It was claimed by the administrator that the defendant owed a duty to keep a lookout for men who might be riding ahead of the train on a velocipede or who might be in or about the tracks. The court held in that case that there was no such positive duty devolving upon the railroad company. There was no proof in the *Nixon* case that it was customary for the engineer in charge of the locomotive to keep a lookout for men who might be upon the tracks in section work nor was it customary to give them any warning. Neither was there any evidence that the train was being operated in an unusual manner. There was no custom relied upon so far as the decision shows. The sole question was whether the railway company "as toward the deceased" owed a duty to keep a lookout ahead.

Manifestly, this case is not authority for holding that the defendant in the instant case owed no duty to the plaintiff whose duties customarily required him to cross between cars standing on this team track, since the switching movement of the cars in question on to the team track exposed the plaintiff to an unusual danger by reason of defendant's "departure from the practice generally followed."

But two cases are cited by the defendant which in any way involve a custom of warning. In one of these, *Cincinnati, etc., R. Co.* v. *Swann,* 160 Ky. 458 (169 S. W. 886), the plaintiff was a foreman whose duty required him to watch for approaching trains. It was held in that case that in the circumstances, he was not entitled to rely on the observance by train employees of rules requiring them to slow down, etc. The rule of law announced in this case

manifestly applies only to employees whose specific duties require them to watch for approaching trains and to warn others of their approach.

The doctrine announced in the second case, *Williams* v. *C. & A. R. R. Co.*, 135 Ill. 491, has never been applied to employees of railroad companies. Such employees are clearly under the decisions heretofore cited, entitled to the protection afforded by rules or general custom.

We submit that even if plaintiff knew that cars were liable to be switched on the team track in question and assumed the risk of such customary switching operation, nevertheless "he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."

Two cases decided by the Circuit Court of Appeals of the United States, Third Circuit, very clearly give the applicable rules and distinguish the *Aerkfetz* and other cases relied upon by the defendant.

The case of *Lehigh Valley R. Co.* v. *Doktor, supra,* 290 Fed. 760, involved an injury to a track worker. We quote from the case:

> "At the trial the plaintiff, in support of his averment of duty, testified there was a yard custom in such cases to give warning. * * * The evidence of the defendant's custom and therefore of its duty to warn trackmen * * * was sharply controverted."

Following the above statement the court said:

> "This case raises no new question of law. It is distinguished from *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and *Connelley* v. *Pennsylvania R. Co.,* 228 Fed. 322, 142 C. C. A. 614, in that the injured workmen in those cases were trackwalkers, who, from the very nature of their work, were required to look out for themselves, while here

the injured man was a trackworker, who, from the very nature of gang work, could not look out for himself when so employed. Nor does this case fall within the class where there is neither a custom of giving warning nor a way of giving warning in freight yards as decided in *Hines, Director General* v. *Jasko* (C. C. A.), 266 Fed. 336. Rather it comes within the law of those cases where a warning of some kind is possible and where it is customary to give it as in *Hines, Director General* v. *Knehr* (C. C. A.), 266 Fed. 340, 341; *Erie R. Co.* v. *Healy* (C. C. A.), 266 Fed. 342, 343; *Director General* v. *Templin* (C. C. A.), 268 Fed. 483, 484, Certiorari denied, 254 U. S. 656, 41 Sup. Ct. 218, 65 L. Ed. 460. Therefore the question of the existence of the two customs of warning, and of the defendant's corresponding duty, was a question of fact properly submitted to the jury—if the evidence was sufficient to sustain a finding."

The cases cited by defendant, viz., *Chicago, etc., R. Co.* v. *Coogan,* 271 U. S. 472; *Gulf, etc., R. R.* v. *Wells,* 275 U. S. 455; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, and *Western Atlantic R. Co.* v. *Hughes,* 73 L. Ed. 268, relative to the sufficiency of evidence to support a charge of negligence, as applied in Federal Courts, are clearly and readily distinguishable from the instant case.

In the *Coogan* case, it was held that in order to support the charge of negligence or show there was any causal relation between the negligence charged and the injury, it would be necessary to resort to mere speculation or conjecture.

In the *Wells* case, wherein a brakeman was attempting to board a freight train moving ten miles an hour, it was held that there was no evidence that the engineer knew or *should have known* that he was not on the train, but was attempting to get on it after it had started, and was in a situation in which a jerk of the train would be dangerous to him.

In the *Harris* case, it was held erroneous to apply a State statute making proof of injury by an engine propelled by steam, *prima facie* evidence of negligence in an action for damages.

In *Western Atlantic R. Co.* v. *Hughes*, 73 L. Ed. 268, it was urged by the defendant that the courts of Georgia erred in applying the scintilla rule of evidence. This court, after reaffirming the doctrine previously announced in a great many cases, that submission to the jury of contested issues is not required if there is only a scintilla of evidence, said:

> "We need not consider whether the rule prevailing in Georgia differs substantially from the Federal rule. For even under the Federal rule, it was proper to submit the case to the jury. * * * At the second trial, thirty-three witnesses testified. Some of the testimony given by the witnesses for the railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. The credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

The evidence for the plaintiff in this case clearly outweighs defendant's evidence on all material controverted questions of fact. In any event, the defendant was not entitled to a directed verdict.

It is respectfully submitted that for the reasons stated, this case be dismissed for want of jurisdiction, or if jurisdiction exists, that the judgment of the Appellate Court of Illinois be affirmed.

Joseph D. Ryan

John T. Burnhall

Counsel for Respondent, Nick Mihas.

APPENDIX.

Section 11, Article 6, Constitution of 1870 of the State of Illinois:

"After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services."

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1929.

The Chesapeake and Ohio Railway Company, Petitioner, *vs.* Nick Mihas.	On Writ of Certiorari to the Appellate Court for the First District of the State of Illinois and/or to the Supreme Court of the State of Illinois.

[November 25, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

Section 121, c. 110, Cahill's Revised Statutes of Illinois, 1927, provides that, except in cases where an appeal or writ of error will lie under the Constitution from the state appellate courts to the supreme court, the judgments of the former shall be final, except (1) in certain cases where, in the opinion of the appellate court judges, questions of importance are involved, such judges may grant appeals to the supreme court on petition, in which case the grounds for granting such appeals shall be certified, and (2) the supreme court may require such cases made final in the appellate courts to be certified for review and determination with the same effect as though carried up by appeal or writ of error. Application was made to the state supreme court for a writ to review the judgment of the appellate court in this case and was denied. The jurisdiction of this Court in granting the petition for a writ of certiorari is now attacked on the ground that petitioner did not exhaust its remedies under state law, because it failed also to apply to the appellate court for a certificate of importance and an appeal as provided in subdivision (1) above. In *Minneapolis, &c. R. Co.* v. *Rock*, 279 U. S. 410, we had under consideration the same question and held that the denial of an application for certiorari by the state supreme court was in effect an affirmance of the judgment, and that it would be unreasonable to require an application to the appellate court for a certificate of importance and appeal when the

supreme court had thus approved the judgment. This Court, therefore, has jurisdiction; and we proceed to consider the merits.

The respondent brought an action in the superior court of Cook County to recover damages for a personal injury suffered while engaged as an employee of petitioner in interstate commerce. That court at the conclusion of the evidence denied a motion for a directed verdict in favor of petitioner. Upon a verdict of the jury, judgment was rendered for respondent, which the appellate court, on appeal, affirmed. 249 Ill. App. 446.

Petitioner seeks to reverse the judgment of the appellate court on the ground, among others, that there was no proof of negligence and the motion for a directed verdict should have been sustained.

Mihas was employed by the railway company to care for switch lights and lamps along the right of way, and had been thus employed for about four years prior to the injury. He had lived all that time near the switch tracks in the yards at Peru, Indiana. He was thoroughly familiar with the switching operations and with the fact that they were carried on every day, usually between the hours of six and seven o'clock in the morning. In doing his work he used a small speeder car, which was kept on the opposite side of the tracks from where he lived; and it was necessary for him to cross these tracks to get the car. About ten minutes before seven o'clock on the morning of the accident, as he came from his house, he saw two men with a truck going away from a coal car which they had been unloading. He testified that he looked to one side and the other, but did not see or hear any train or cars approaching. Proceeding directly from his house, on his way across the tracks to get the speeder car, he attempted to climb over a coal car standing with a number of others on a switch track. While in the act of doing so, a string of nine cars was forcibly propelled by means of a flying switch against the standing cars with such violence that Mihas was thrown between two cars and severely injured. The cars being switched moved at the rate of four or five miles per hour, which was not an unusual speed for that kind of an operation. Those engaged in the movement had no knowledge of Mihas' position or of his movements. One of the standing cars contained coal, and shortly prior to the switching operation the two men seen by Mihas had been engaged in unloading the coal into a truck, but at the time of the impact they had driven off and were

some distance away from the standing cars. There was evidence to the effect that it was customary for train men personally to notify persons engaged in unloading cars before making a switching operation likely to affect them; but that such notice was exclusively for men so engaged. Mihas testified that he knew of this practice. He heard no notice given to the men on the occasion in question; but whether he crossed the cars relying upon that fact the testimony does not make clear, although it is assumed in the briefs and arguments and we assume that he did. He could have crossed in a roundabout way without climbing over the cars, and his selection of the latter method was for his own convenience. Mihas testified that his foreman knew about his having to cross the tracks and had never told him not to cross between the cars; but there is no evidence that the foreman or any agent or employee of the company had knowledge that Mihas ever crossed by climbing over standing cars.

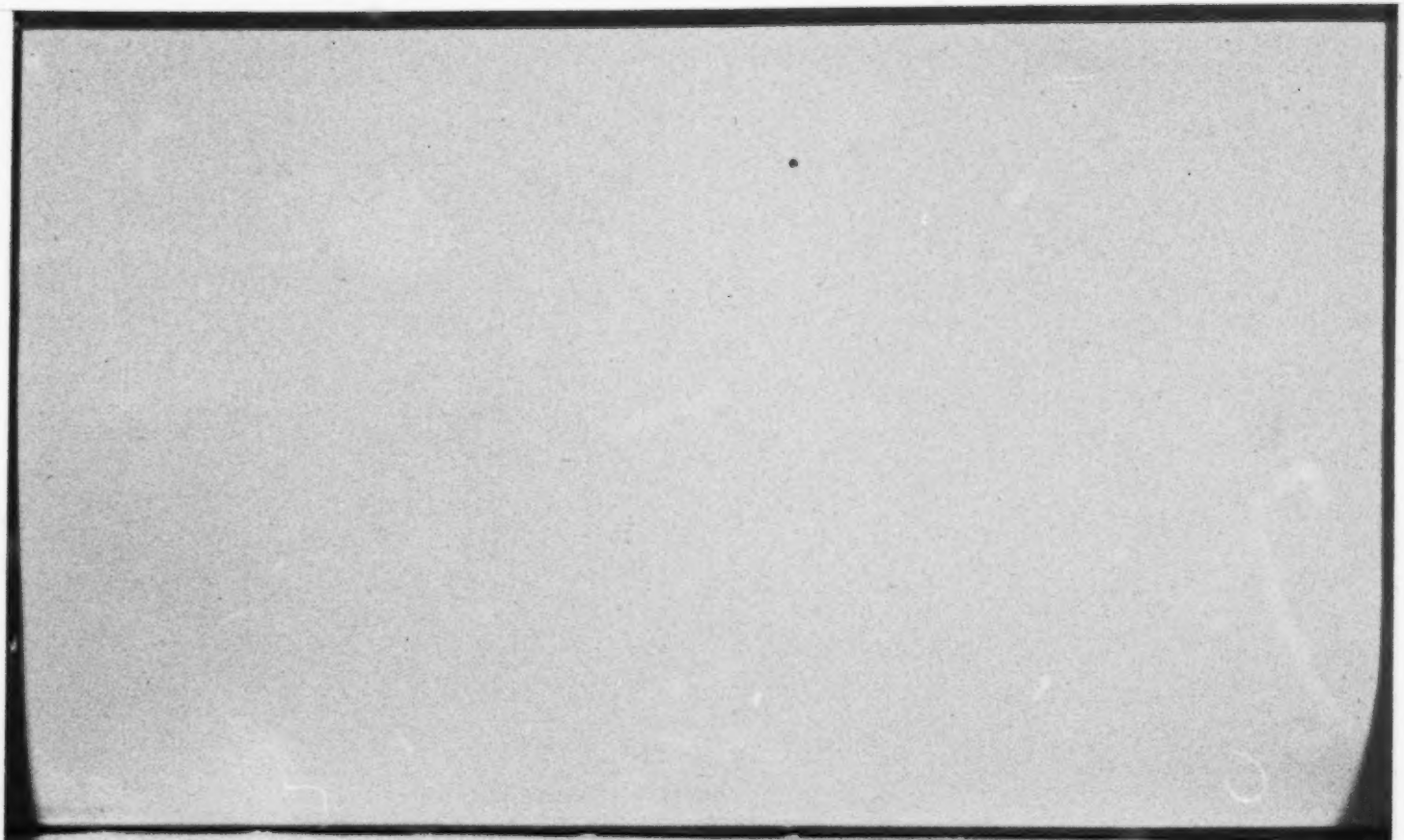
The negligence complained of is that in making the flying switch the standing cars were struck with great and unnecessary force; that it was the established custom of the railway company to give due notice and warning to all persons in or about such cars before moving or shunting other cars against the standing cars; and that such notice or warning was not given upon the occasion in question. The evidence, however, is that the notification or warning was exclusively for persons, not employees, engaged in unloading cars. There was no custom or duty of that kind in respect of employees engaged on or about the tracks. If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. In *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218, the facts were that a section foreman whose employment obliged him to go over and examine the track was on a tour of inspection. For that purpose he used a velocipede fitted to the rails. He was overtaken by a train and killed. The negligence charged was that the engineer and foreman of the train were not on the lookout; and the proof was to that effect. It was held that that duty was one which the railroad company might owe to others but not toward the class of employees to which the deceased belonged; and a recovery for his death was reversed. In

O'Donnell v. *The Providence and Worcester Railroad Company*, 6 R. I. 211, it was held that a statute giving a right of action to one injured by the neglect of the railroad company to ring the locomotive bell before making a highway crossing was designed exclusively for the benefit of persons crossing the highway, and one injured while walking along the track not at a crossing could not recover under the statute. The court said (p. 214):

"If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; L Salk. 335,) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law,' confining the remedy to such things as are enacted for the benefit of the person suing."

See also, *Pheasant* v. *Director General of Railroads*, 285 Fed. 342, 344; *C., N. O. & T. P. R. Co.* v. *Swann's Admx.*, 160 Ky. 458, 469.

There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or take other steps to protect him. *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 173.

The evidence failing to show negligence on the part of the company, the motion for a directed verdict in favor of the petitioner should have been granted.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.